

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i

November 10, 2022

**Board of Land and
Natural Resources
State of Hawai'i
Honolulu, Hawai'i**

REGARDING: (1) Approval of a Settlement Agreement, Restrictive Covenant, and Seawall Removal Plan and Stipulated Judgment to resolve *State of Hawai'i v. James O'Shea and Denise O'Shea, as Trustees of the James and Denise O'Shea Trust, James O'Shea, individually and Denise O'Shea, individually*, Civil No. 17-1-1543-09 JPC, and Contested Case OA-18-01 regarding 59-171 D Ke Nui Road, Hale'iwa, O'ahu, Tax Map Key No. (1) 5-9-002:025 (seaward), and delegation of authority to the Chairperson to execute the same;

(2) Approval of a Declaration of Exemption for the Demolition and Removal of a Seawall from Chapter 343, Hawaii Revised Statutes Located at 59-171 D Ke Nui Road, Hale'iwa, O'ahu, Tax Map Key No. (1) 5-9-002:025 (seaward)

Pursuant to HRS § 92-5(a)(4) the Board may go into Executive Session in order to consult with its attorney on questions and issues pertaining to the Board's powers, duties, privileges, immunities and liabilities.

SETTLING PARTIES: James O'Shea and Denise O'Shea, individually and as Trustees of the James C. and Denise O'Shea Living Trust, dated August 16, 2004 ("**O'Sheas**")

LOCATION: Seaward of 59-171 D Ke Nui Road, Hale'iwa, O'ahu, 96712, Tax Map Key No. (1) 5-9-002:025 ("**Property**")

SUBZONE: Resource

LEGAL AUTHORITY: Sections 91-9(e), 171-6, 183C-3 Hawaii Revised Statutes. Hawaii Administrative Rules ("**HAR**") Chapter 11-200.1, Subchapter 8; and HAR § 13-1-28(c).

BACKGROUND:

This case is about an unauthorized seawall built by private property owners, the O'Sheas,

on State Conservation land after a previously built seawall collapsed. The O'Sheas own an oceanfront residential parcel located at 59-171 D Ke Nui Road, Haleiwa, Hawai'i (TMK (1) 5-9-002:025) (the "Property"). The Property sits immediately *mauka*, or landward, of Sunset Beach Park. An old seawall (the "Old Seawall") formerly stood *makai* (seaward) of the Property. The Old Seawall collapsed in 2017. Without State authorization and without obtaining County permits, the O'Sheas built a new seawall ("New Seawall") which the State contends constitutes a trespass on State-owned, submerged land in the Conservation District.

To understand the present controversy, it is important to recognize that the State's position is that it owns legal title to all submerged lands and holds these lands in public trust. As articulated in Attorney General ("A.G.") Opinion 17-01 (attached hereto as **Exhibit A**), the State owns all lands *makai* or seaward of "the upper reaches of the wash of the waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of the waves." The upper reaches of the wash of the waves is also referred to as the "shoreline." When erosion causes the shoreline to move landward, the newly submerged lands thus become State lands.

In 1971, the Governor's Executive Order 2598 set aside the land between the shoreline and the privately-owned beach lots lining Sunset Beach (including the Property), to the City and County of Honolulu to manage as Sunset Beach Park. Given the State's position set forth in A.G. Opinion 17-01, to the extent that erosion has caused the shoreline to move landward such that it abuts or goes past the boundary between the privately-owned beach lots and the county managed Sunset Beach Park, the State's position is that the portion of the land set aside to the County for a beach park has become submerged lands under the jurisdiction of the State.

By the time the O'Sheas purchased the Property in 2001, the Old Seawall had been there for many years, although the date it was built has never been conclusively determined. The O'Sheas contend it was a nonconforming structure because it was built before the establishment of the Conservation District. In any case, there is no dispute that it had always been seaward of the Property's boundary line, and thus it was either on State land or in the beach park.

On September 3, 2017, the Old Seawall collapsed. The O'Sheas blame the collapse on their then-neighbor to the west, Rupert Oberlohr. They claim that Mr. Oberlohr attempted to reinforce his own, connected seawall with a steel cable system that inadvertently pushed the O'Sheas' wall forward, causing it to topple onto the beach.

The O'Sheas quickly started to construct a new wall to replace the one that collapsed. However, visually, it was clear that work was taking place on State land below the highest wash of the waves. On September 8, 2017, the Office of Conservation and Coastal Lands ("OCCL") of the Department of Land and Natural Resources ("DLNR") delivered a letter to the O'Sheas notifying them that they may be in violation of Hawai'i Administrative Rules and statutes for engaging in unauthorized land use in the Conservation District.

DLNR conducted several site inspections after the letter was sent and it appeared that construction was still ongoing.¹ Thus, on September 22, 2017, the State obtained a temporary

¹ The O'Sheas deny that they were continuing to work during these site inspections, and that DLNR observed work that was being done by their neighbors instead. However, in Mr.

restraining order (“TRO”) enjoining the O’Sheas from continuing to construct the wall through October 2, 2017. However, once the TRO expired, the O’Sheas completed building their new wall. The new seawall was finished in November 2017.

The “New Seawall” is located landward of the debris of the “Old Seawall” (i.e. the collapsed wall), and is approximately fifteen feet tall, forty-six feet long, and eight feet thick at the base, tapering to about two feet thick at the top. It is made of concrete and boulders. The O’Sheas maintain that it is merely a repair of the Old Seawall, which collapsed. However, they admitted in discovery that the New Seawall was built “separate and apart” from the Old Seawall. Indeed, the Old Seawall, consisting of large concrete pillars and a concrete wall on top, is still largely in the spot where it collapsed on the beach. See photo below:



The O’Sheas did not obtain any permits from either the State or the County before they finished the New Seawall. They did obtain an after-the-fact building permit from the Department of Planning and Permitting (“DPP”) in 2019, but the permit was swiftly revoked. DPP discovered that the permit had been issued based on incorrect information – the O’Sheas categorized the work as a “repair” when in fact they had built a new structure.

LAWSUIT AND ENFORCEMENT ACTION:

On October 13, 2017, OCCL brought enforcement action OA-18-06 against the O’Sheas for the construction of the New Seawall in the Conservation District. The Conservation District

O’Sheas’ deposition, he admitted that sometime before the TRO was issued, they did resume work on their wall.

necessarily includes all lands *makai* of the shoreline. HAR § 15-15-20(6). The staff submittal for OA-18-06 is attached hereto as **Exhibit B**. OCCL sought \$75,000 in fines for unauthorized land use and \$2,500 in administrative costs.

The O'Sheas requested a contested case to challenge OA-18-06. OCCL opened Contested Case OA-18-01 regarding enforcement action OA-18-06, but thus far, no hearing officer has been appointed and the contested case has been stayed pending the resolution of the lawsuit between the O'Sheas and the State described herein.

On September 22, 2017, the State filed an action in the Circuit Court of the First Circuit, State of Hawaii, captioned *State of Hawai'i v. James O'Shea and Denise O'Shea, as Trustees of the James and Denise O'Shea Trust, James O'Shea, individually, and Denise O'Shea, individually*, Civil No. 17-1-1543-09 (JPC) (the "Lawsuit"). The operative complaint in the Lawsuit is the Second Amended Complaint for Injunctive Relief filed on September 7, 2018 (the "Complaint" attached hereto as **Exhibit C**). The Complaint alleges three counts: a Quiet Title claim and a prayer for injunctive relief under HRS § 669-1 (Count I), Trespass (Count II), and Encroachment (Count III). The Complaint asks the Court to order the O'Sheas to remove the New Seawall.

On September 17, 2018, the O'Sheas filed a Counterclaim against the State. The Counterclaim is primarily based on the allegation that the State built the old seawall in the 1950s, that the State failed in their duty to maintain the wall, that the State failed to allow the O'Sheas to take measures to protect the wall, and that as a result of these failures, the State contributed to the old seawall's collapse. The Counterclaim contained six counts: Declaratory Relief (Count I), Negligence (Count II), Loss of Lateral and Subjacent Support (Count III), Diminution in Property Value (Count IV), Nuisance (Count V), and Inverse Condemnation (Count VI). The Counterclaim is also attached as **Exhibit D**.

The O'Sheas also filed a Third-Party Complaint against Mr. Oberlohr for causing the old seawall to collapse with his cable system. Mr. Oberlohr sued them back with a counterclaim. There are no claims between the State and Mr. Oberlohr.

A bench trial in the Lawsuit was supposed to commence on August 22, 2022 but was taken off calendar given that a tentative settlement agreement, subject to the Board's approval, was reached between OCCL and the O'Sheas.

SETTLEMENT RECOMMENDATION:

Although the deputy attorneys general handling the Lawsuit for OCCL are confident that the State would prevail if this case went to trial, OCCL and its attorneys recommend settling on the terms described below in order to facilitate the removal of the New Seawall as quickly as possible for the sake of the sandy beach which the State has a public trust duty to protect for future generations.

As OCCL described in the staff submittal for enforcement action OA-18-06, the beaches of the North Shore of O'ahu are among some of the most valuable natural resources in the State. These beaches, including Sunset Beach, are an essential economic engine for the North Shore community.

Unfortunately, Sunset Beach, including the stretch of beach fronting the Property, is incredibly vulnerable to erosion, which has significantly intensified in recent years. In connection with the Lawsuit, Bradley Romine, PhD, Coastal Geologist and Hawaii Sea Grant Extension Agent, prepared an expert report for the State (attached hereto as **Exhibit E**). Dr. Romine reported that the beach fronting the subject Property is undergoing a long-term trend of erosion (net landward movement of the beach) of about 0.7 feet per year.

Historically, throughout Hawai‘i, the typical response to coastal erosion has been construction of seawalls and other coastal armoring structures to protect coastal properties. The harmful effects of coastal armoring on beaches have been documented and studied in much detail on O‘ahu. When installed on an eroding beach, seawalls lead to beach narrowing and beach loss through a process called “coastal squeeze.” As sand continues to be washed away fronting the New Seawall by ongoing erosion, the seaward edge of the beach (i.e., beach toe) continues to move landward toward the base of the fixed seawall, narrowing and ultimately pinching-off the beach. Beach sand is impounded behind the New Seawall that would otherwise be eroded through coastal processes to nourish and sustain the beach system, compounding the erosion and beach loss. Beach loss is occurring fronting the subject Property through the processes described above on a seasonal (i.e., intermittent) and long-term basis.

Beach narrowing becomes severe fronting the New Seawall on an intermittent basis, to the point that the beach is submerged and no dry beach is remaining, impeding natural coastal processes and alongshore public access. See photo below:



At these times, public alongshore access becomes unsafe fronting the New Seawall as waves repeatedly overwash concrete materials left from the Old Seawall and waves impact the New Seawall. Natural limestone rock is also exposed at the base of the wall when the sand is lost, further impeding public access. This beach loss also blocks alongshore access by City & County of Honolulu lifeguards who conduct safety patrols and rescues on the beach using all-terrain vehicles.

Sea levels are rising around Hawai‘i as a result of global mean sea level rise. Rates of shoreline change are expected to increase with increasing sea level rise such that period of

intermittent beach loss in front of the Property will become more frequent, more severe, and ultimately permanent in a matter of years to decades fronting the New Seawall.

Thus, OCCL's priority is to have the New Seawall removed as soon as possible. However, even if the State wins the Lawsuit, the O'Sheas will almost certainly appeal and would likely obtain a stay of the enforcement of the judgment. Thus, even assuming that the State prevails on appeal, it would likely be several years before OCCL could enforce a judgment ordering that the wall be removed. While this case is on appeal, the New Seawall will continue to damage public trust lands. Further, once a judgment becomes enforceable, it will still take considerable time to complete the removal of the New Seawall, given its size and the difficulty of access, especially during the winter months. It is in the State's best interest to set a definite deadline for removal.

OCCL and the O'Sheas have negotiated a proposed settlement agreement which would give the O'Sheas a reasonable amount of time to remove the New Seawall but would enable the State to immediately remove the wall itself, impose fines against the O'Sheas, and hold the O'Sheas accountable for the costs of the wall removal if the O'Sheas do not comply. The agreement would run with the Property and would thus be enforceable against any new owners the O'Sheas sell the Property to. The agreement would thus avoid the delay, costs, and uncertainty of litigation.

The proposed Settlement Agreement, Restrictive Covenant, and Seawall Removal Plan ("Settlement Agreement") and Stipulated Judgment are attached hereto as **Exhibits F and G**, respectively. The essential terms of the Settlement Agreement are:

1. The O'Sheas will remove and dispose of the New Seawall by December 31, 2024 utilizing a licensed contractor. The State will cooperate with the O'Sheas in obtaining any and all permits required for removal as necessary. Removal does not include debris from the Old Seawall.
2. If circumstances outside of the O'Sheas' control make it impossible to remove the New Seawall by December 31, 2024 (including, but not limited to, logistical issues outside of the O'Sheas' control, weather conditions, etc.), then the O'Sheas may petition the BLNR for additional time to remove the New Seawall. However, the mere fact that surf becomes higher in the winter months is not in itself a circumstance outside of the O'Sheas' control; the O'Sheas agree to plan so that removal can take place when conditions allow.
3. The parties will execute a Stipulated Judgment ordering the New Seawall to be removed by December 31, 2024 or any further date allowed by the BLNR. The judgment will be recorded in the Bureau of Conveyances and shall run with the land. The Stipulated Judgment will not be executed by the State until the latter of January 1, 2025, or such other extensions as may be granted by the BLNR.
4. OCCL shall ask the BLNR to find that the demolition of the New Seawall is exempt from HRS Chapter 343 requirements (i.e. find that the demolition does not require an environmental assessment).

5. The O'Sheas will obtain commercial general liability insurance to cover liability arising out of the removal of the New Seawall, as well as any liability which is incurred before removal takes place but while the New Seawall remains on the beach.
6. The O'Sheas will indemnify the State from any claims arising from the New Seawall or any work associated with its removal, but will not indemnify the State from any claims which may be brought by adjacent homeowners alleging that the New Seawall should not be removed at all.
7. The O'Sheas will be liable for a fine of \$50,000, and an administrative fee of \$2,500, payable on December 31, 2024 or any further date allowed by BLNR. However, if the O'Sheas remove the wall by December 31, 2024 or a further date allowed by the BLNR, the O'Sheas' actual cost of wall removal (with proof of payment) will be credited against the fines and fee.
8. The State and the O'Sheas shall cooperate in obtaining any other Court order, including but not limited to Act 300 (i.e. HRS § 663-15.5) approval, that the O'Sheas determine will limit their liability from claims by adjacent landowners.
9. If the New Seawall is not removed by December 31, 2024, or a further date allowed by the BLNR, the State may immediately remove the wall itself. The O'Sheas (or future landowner, as this agreement will run with the land) will be jointly and severally liable for all costs incurred to remove the New Seawall.
10. This will be a global settlement between the O'Sheas and the State for all claims that were brought, or could have been brought in the Lawsuit and the BLNR enforcement action. The O'Sheas' Counterclaims against the State and the BLNR administrative enforcement action will be dismissed with prejudice. The State represents that the only violation outstanding against the O'Sheas is the single enforcement action. This does not affect any claims between the O'Sheas and Mr. Oberlohr.

The Settlement Agreement and the Stipulated Judgment have been reviewed and approved by the O'Sheas and their attorneys. OCCL recommends and requests that the Board approve the Settlement Agreement and Stipulated Judgment and delegate authority to execute the same to its Chairperson. Execution is also subject to final approval by the Department of the Attorney General.

CHAPTER 343 – ENVIRONMENTAL ASSESSMENT:

The demolition and removal of the New Seawall is exempt from the preparation of a Chapter 343, HRS environmental assessment. In accordance with HAR §§ 11-200.1-15, -16 and the Exemption List for the Department of Land and Natural Resources reviewed and concurred by the Environmental Council on November 10, 2020, the demolition of the New Seawall is exempt from the preparation of an environmental assessment pursuant to General Exemption Type 6 "Demolition of Structures, except those structures that are listed on the National Register or Hawaii Register of Historic Places", Item 5 "Demolition and removal of unauthorized improvements."

RECOMMENDATIONS:

That the Board of Land and Natural Resources:


1. Approve and delegate to the Chairperson the authority to execute the Settlement Agreement and Stipulated Judgment substantially in the forms attached hereto as Exhibits 6 and 7, subject to such other terms and conditions as may be prescribed by the Chairperson to best serve the interests of the State, and final review and approval by the Department of the Attorney General.
2. Authorize the Chairperson to take all action and execute any documents necessary for the dismissal of the lawsuit, pursuant to the Settlement Agreement.
3. Declare that, after considering the potential effects of the demolition and removal of the New Seawall as provided by Chapter 343, HRS and Chapter 11-200.1, HAR, such project will probably have minimal or no significant effect on the environment and is therefore exempt from the preparation of an environmental assessment.

Respectfully submitted,



For MICHAEL CAIN, Administrator
Office of Conservation and Coastal Lands

APPROVED FOR SUBMITTAL:



SUZANNE D. CASE, Chairperson
Board of Land and Natural Resources

Attachments

Location Map

Exhibit A – Attorney General Opinion No. 17-01

Exhibit B – October 13, 2017 Staff Submittal for Item K-2 (OA-18-06)

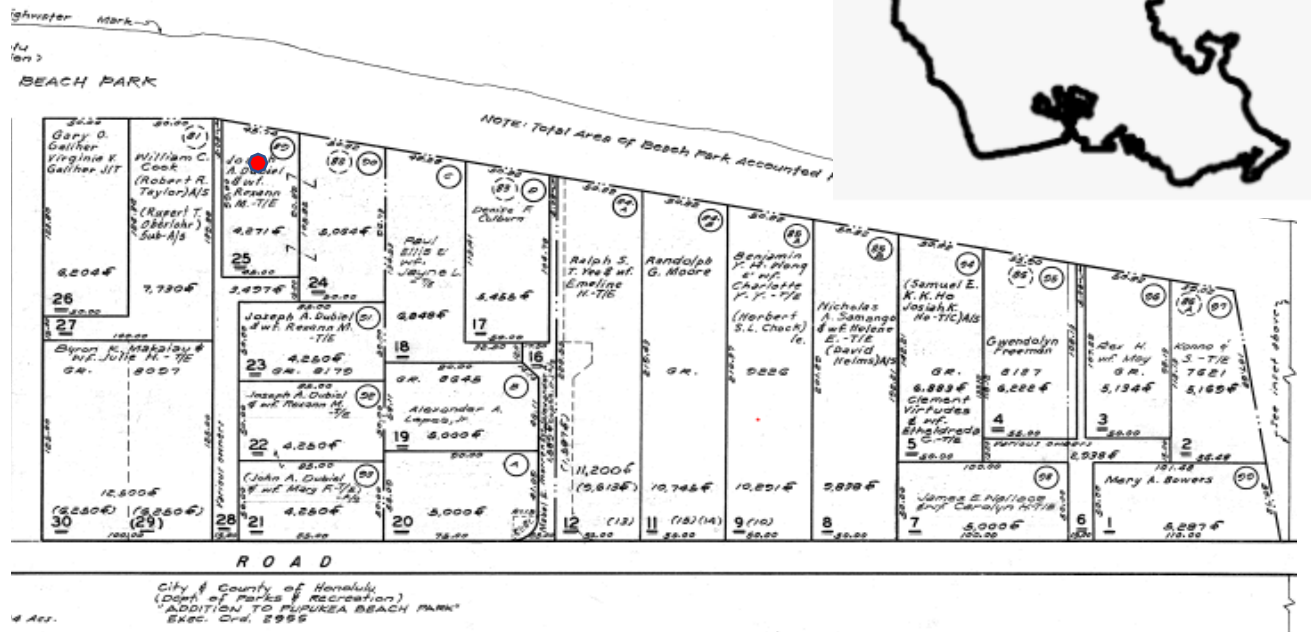
Exhibit C – September 7, 2018 Second Amended Complaint

Exhibit D – September 17, 2018 Answer and Counterclaim

Exhibit E – Report on Impacts from the Seawall Constructed at 59-171 D Ke Nui Road, North Shore of O‘ahu, by Bradley M. Romine, PhD, Coastal Geologist

Exhibit F – Settlement Agreement, Restrictive Covenant, and Seawall Removal Plan (proposed)

Exhibit G – Stipulated Judgment (proposed)



HIGHWAY

TO KAHULU
PARCELS DROPPED: 75, 43, 64

NOTE:
Numbers indicated thusly (125) refer to lot numbers of Pupukea-Paumotu Beach Lohi Subd.
Numbers indicated thusly (45) refer to lot numbers of Sunset Beach Lohi - P.M. 255.

PLAT 14

DEPARTMENT OF THE TAX COMMISSIONER			
TAXATION MAPS BUREAU			
STATE OF HAWAII			
TAX MAP			
FIRST	SEC.	DIVISION	PLAT
5	9		02
CONTAINING		PARCELS	

SUBJECT TO CHANGE



<https://pltis.hawaii.gov/HomeAuthenticated/Map>

LOCATION MAP

DAVID Y. IGE
GOVERNOR



DOUGLAS S. CHIN
ATTORNEY GENERAL

STATE OF HAWAII
DEPARTMENT OF THE ATTORNEY GENERAL
425 Queen Street
Honolulu, Hawaii 96813

RUSSELL A. SUZUKI
FIRST DEPUTY ATTORNEY
GENERAL

December 11, 2017

The Honorable Suzanne D. Case
Chairperson, Board of Land and Natural Resources
State of Hawai'i
1151 Punchbowl Street, Room 130
Honolulu, Hawai'i 96813

Dear Chairperson Case:

RE: Shoreline Encroachment Easements

INTRODUCTION

By memorandum dated August 10, 2017, you asked for our advice regarding the Board of Land and Natural Resource's practice of requiring private owners of coastal properties to obtain easements for structures that were originally constructed on private property but are now located on State-owned land due to the landward migration of the shoreline.

QUESTIONS AND SUMMARY ANSWERS¹

1. What is the dividing line between public and private property with respect to oceanfront property?

Short answer: The State owns all lands makai of the "the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves." For convenience, we refer to this description as the

¹ The intent of your memorandum is clear even though it does not directly ask specific questions. We have taken the liberty of setting out questions we believe are raised.

"shoreline." This use of the term "shoreline" is closely related to but not exactly the same as the "certified shoreline" described in chapter 205A, Hawaii Revised Statutes (HRS). This line (the shoreline) is identical to -- and indeed defines -- the dividing line between public and private property (the ownership line).²

2. How is the ownership line affected when there is landward migration of the shoreline caused by erosion or sea level rise?

Short answer: By definition, if the shoreline moves landward, then the ownership line also moves mauka.³

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

Short answer: The State already owns an inchoate interest in land that might be gained through erosion or sea level rise. Ripening of this inchoate interest is not "acquisition" of land covered by these statutes. This result is fortified by the Supreme Court's decision in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The Court held that the statutes do not "imperatively require" abrogation of common law rules or "evinced an express legislative intent to do so."

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

Short answer: No. The Hawai'i Supreme Court has specifically considered and rejected such claims. As to federal

² The shoreline and ownership lines are the same where the shoreline is not affected by structures. No Hawai'i case or statute addresses the question of where the ownership line is when the shoreline is affected by a seawall or other man-made structure. We have not found it necessary to address that question in providing this advice.

³ The term "mauka" means "inland." *Leslie v. Bd. of Appeals of County of Hawai'i*, 109 Haw. 384, 386, 126 P.3d 1071, 1073, note 3 (2006). A "mauka" movement of the ownership line means toward the mountain or (equivalently) away from the sea.

taking law, the State's inchoate rights in the property existed prior to private ownership. The interest lost was not part of private title to begin with and cannot be the basis of a taking claim.

5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?

Short answer: No. Ownership of land by erosion or sea level rise is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. Therefore the statutes requiring that the Attorney General review and approve land acquisitions do not apply.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Short answer: Yes, applicable statutes specifically provide for the payment of fair market value in most cases.

DISCUSSION

1. What is the dividing line between public and private property with respect to oceanfront property?

It is the uniform law of every coastal state that land below (seaward or "makai" of) the shoreline is owned by the State and held in public trust⁴ for the people of the State.⁵

⁴ The public trust doctrine is a common law doctrine, inherited from England and dating back to Roman law, dictating that all submerged lands are the property of the state and held in trust for the people. *Shively v. Bowlby*, 152 U.S. 1 (1894). The seminal United States case for the public trust doctrine is *Illinois Cent. R.R. Co. v. State of Illinois*, 146 U.S. 387 (1892). The seminal case in Hawai'i is *King v. Oahu Ry. & Land Co.*, 11 Haw. 717 (1899). In Hawai'i the public trust is also recognized in the Constitution, article XI, section 1.

⁵ The same issue can arise as to rivers, lakes, or other bodies of water. Indeed *Illinois Cent. R.R. Co.*, see *supra* note 4,

Most states define the shoreline/ownership boundary as the mean high tide mark. *Purdie v. Attorney Gen.*, 143 N.H. 661, 666, 732 A.2d 442, 446-47 (1999):

The few States that reject the mean high tide mark as the public-private shoreland boundary do so on distinct histories not applicable to our State. See, e.g., *Application of Ashford*, 50 Haw. 314, 440 P.2d 76, 77 (1968) (Hawaii boundary based on Hawaiian King's issuance of royal patents in 1866); *Bell v. Town of Wells*, 557 A.2d 168, 171-72 (Me.1989) (Massachusetts and Maine adopted mean low water as boundary line based on 1647 Massachusetts ordinance); cf. *Opinion of the Justices (Public Use of Coastal Beaches)*, 139 N.H. at 88-89, 649 A.2d at 608 (refusing to adopt Massachusetts rule for New Hampshire).

See also Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in a Changing Climate*, 30 Stan. Envtl. L.J. 52, 57 (2011) ("In nearly all cases, the lines for defining the limits of private title and public access are the mean high water and mean low water marks.")

Purdie rightly identifies Hawai'i as a state with a unique approach to defining the shoreline. This approach was initiated and explained in three landmark cases, all authored by then Chief Justice William S. Richardson.

In *Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), the Court considered the ownership line in the context of a request to register land title in the land court:

Clinton R. Ashford and Joan B. S. Ashford, the appellees, petitioned the land court to register title to certain land situate on the Island of Molokai. The lands are the makai (seaward) portions of Royal Patent 3004 to Kamakaheki and Royal Patent 3005 to Kahiko, both issued on February 22, 1866.

concerned sale of land filled land reclaimed from Lake Michigan. Freshwater shorelines present some extraneous complications and are not further considered in this letter.

The question before this court is the location of the makai boundaries of both parcels of land, which are described in the royal patents as running 'ma ke kai' (along the sea). The appellees contend that the phrase describes the boundaries at mean high water which is represented by the contour traced by the intersection of the shore and the horizontal plane of mean high water based on publications of the U. S. Coast and Geodetic Survey.

50 Haw. at 314-15, 440 P.2d at 76-77.

The Court held that the boundary (ownership line) was not the mean high water mark. Rather the boundary -- pursuant to Hawaiian custom as established by kama'aina⁶ testimony -- is further mauka, specifically: '

along the upper reaches of the wash of waves, usually evidenced by the edge of vegetation or by the line of debris left by the wash of waves, and that the trial court erred in finding that it is the intersection of the shore with the horizontal plane of mean high water.

50 Haw. at 14, 440 P.2d at 77 (1968). That landmark ruling was confirmed and elaborated on in *Hawaii County v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973), and *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). See *Sotomura*, 55 Haw. at 182, 517 P.2d at 62:

We hold as a matter of law that where the wash of the waves is marked by both a debris line and a vegetation line lying further mauka; the presumption is that the upper reaches of the wash of the waves

⁶ "Kama'aina" is defined as "Native-born, one born in a place, host." Other relevant senses include "acquainted [with], familiar." M. Pukui & S. Elbert, *Hawaiian Dictionary* 9 (rev. ed. 1986).

Leslie v. Bd. of Appeals of County of Hawai'i, 109 Haw. 384, 386, 126 P.3d 1071, 1073 (2006), as amended (Feb. 28, 2006).

over the course of a year lies along the line marking the edge of vegetation growth. The upper reaches of the wash of the waves at high tide during one season of the year may be further mauka than the upper reaches of the wash of the waves at high tide during the other seasons. Thus while the debris line may change from day to day or from season to season, the vegetation line is a more permanent monument, its growth limited by the year's highest wash of the waves.

See *Sanborn*, 57 Haw. at 182, 562 P.2d at 773 (1977):

The law of general application in Hawaii is that beachfront title lines run along the upper annual reaches of the waves, excluding storm and tidal waves.

2. How is the ownership line affected when the shoreline moves landward or mauka because of erosion or sea level rise?

These same cases address and resolve the issue of whether and how ownership changes when the shoreline moves landward or mauka due to erosion or rising sea levels.

Sotomura is particularly relevant. In that case, the private owner indisputably owned the land in the past. In fact, the private owner had registered the property in the land court. The land court had determined the seaward boundary of the property and described it by distances and azimuths. The shoreline moved mauka due to erosion. The Court framed the question as "whether title to land lost by erosion passes to the state." The Court noted that this was an issue of first impression in Hawai'i.

The Court held that the answer was "yes," making clear that the ownership was fluid and specifically that it changed with erosion:

We hold that registered ocean front property is subject to the same burdens and incidents as unregistered land, including erosion. HRS § 501-81. Thus the determination of the land court that the seaward boundary of Lot 3 is to be located along high water mark remains conclusive; however, the precise

location of the high water mark on the ground is subject to change and may always be altered by erosion.

55 Haw. at 180, 517 P.2d at 61.

Even the previous determination of boundaries in land court was not binding where the actual shoreline was altered by erosion:

This court recently rejected the position that the state cannot subsequently challenge title to registered land where the state later discovered that the seaward boundary was located further mauka than shown on the maps, and a portion of the property had become submerged by erosion.

55 Haw. at 181, 517 P.2d at 61 (citing *In re Application of Castle*, 54 Haw. 276, 277, 506 P.2d 1, 3 (1973)).⁷

⁷ *Sotomura* has a complex and murky path after the Hawai'i Supreme Court decision. The United States Supreme Court rejected the owners' petition for certiorari. 419 U.S. 872 (1974). Landowners then sued the County and State officials in federal court. The federal district court judge was the Honorable Dick Yin Wong. Judge Wong was previously the state land court judge. It was his decision that the Hawai'i Supreme Court reversed in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977).

Judge Wong ruled in federal court that the Hawai'i Supreme Court deprived landowners of due process by deciding the case on a basis not presented by the parties or actually litigated. Judge Wong also held that the Hawai'i Supreme Court's decision "ignore[ed] vested property rights" and "was so radical a departure from prior state law as to constitute a taking of the Owners' property by the State of Hawaii without just compensation in violation of rights secured to them by the Fourteenth Amendment to the United States Constitution." *Sotomura v. Hawaii County*, 460 F. Supp. 473, 482-83 (D. Haw. 1978).

Although Judge Wong wrote the decision, it appears that Judge Samuel King entered the judgment. Defendants appealed but the

Importantly, the Court based its ruling on the common law principle that loss of land by erosion is an inherent aspect of littoral property:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership. . . . [W]hen the sea, lake or navigable stream gradually and imperceptibly encroaches upon the land, the loss falls upon the owner, and the land thus lost by erosion returns to the ownership of the state. *In re City of Buffalo*, 206 N.Y. 319, 325, 99 N.E. 850, 852 (1912).

55 Haw. at 183, 517 P.2d at 62.

One reason for that common law rule (now abrogated in part by statute, section 171-2, HRS) is the tradeoff between accretion and erosion: "since the riparian owner may lose soil by the action of the water, he should have the benefit of any land gained by the same action." *Id.* (citing 65 C.J.S. *Navigable Waters* § 82(1), at 256 (1966) (footnotes omitted)). See *Application of Banning*, 73 Haw. 297, 303-04, 832 P.2d 724, 728 (1992), where the Court explained that accretion belongs to the littoral landowner.

Sotomura also relied on the public trust doctrine, citing to *King v. Oahu Ry. & Land Co.*, 11 Haw. at 723-24, for the proposition that:

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

55 Haw. at 184, 517 P.2d at 63. Public policy therefore "favors extending to public use and ownership as much of Hawaii's shoreline as is reasonably possible." 55 Haw. at 182, 517 P.2d 61-62.

appeal was untimely. See *Sotomura v. Hawaii County*, 679 F.2d 152 (9th Cir. 1982).

This public policy remains in effect as the Court has repeatedly ruled. *Application of Banning*, 73 Haw. 297, 309-10, 832 P.2d 724, 731 (1992); *Diamond v. Dobbin*, 132 Haw. 9, 26, 319 P.3d 1017, 1034 (2014); *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 458, 403 P.3d 214, 235 (2017).

The Court reached the same result in *Application of Sanborn*, 57 Haw. 585, 562 P.2d 771 (1977). *Sanborn* also concerned property registered in the land court where the shoreline moved mauka from the land court boundary. The Court framed the issue as:

In addressing the issue of the Sanborns' beachfront title line, the primary question is whether the line is to be determined according to Hawaii's general law of ocean boundaries, or whether certain distances and azimuths contained in the Sanborns' 1951 land court decree of registration are to prevail.

57 Haw. at 588, 562 P.2d at 773.

The Court specifically held that the land court boundary was subject to change in the event of erosion:

We hold that, regardless of whether or not there has been permanent erosion, the Sanborns' beachfront title boundary is the upper reaches of the wash of waves. Although we find that the State is bound by the 1951 decree to the extent that the decree fixes the Sanborns' title line as being 'along the high water mark at seashore', we also find that the specific distances and azimuths given for high water mark in 1951 are not conclusive, but are merely prima facie descriptions of high water mark, presumed accurate until proved otherwise.

57 Haw. at 590, 562 P.2d at 774.

The Ninth Circuit Court of Appeals made the same ruling in *Napeahi v. Paty*, 921 F.2d 897 (9th Cir. 1990). The court there considered ownership of land that was mauka of the shoreline when ceded land was granted to the Territory in 1898. The land later became makai of the shoreline because of erosion. The court specifically held that the property moved from private to public ownership.

[T]he holdings in *Sotomura* and *Zimring*⁸ require us to conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

Napeahi v. Paty, 921 F.2d 897, 903 (9th Cir. 1990).

For these reasons and based on the cases cited above, we advise that the law in Hawai'i is that when the shoreline boundary migrates landward or mauka because of erosion or sea level rise, the State owns the additional submerged land that results from the migration.

3. What, if anything, is the effect of statutes that require the Board of Land and Natural Resources (Board) or the Attorney General to approve "acquisition" of real property?

A concern has been raised as to a trio of statutes that require Board and Attorney General approval of acquisitions of real property or interests in real property. The statutes are sections 26-7, 107-10, and 171-30, HRS.⁹

⁸ *State by Kobayashi v. Zimring*, 58 Haw. 106, 566 P.2d 725 (1977). This case is discussed in more detail below.

⁹ Section 26-7, HRS provides in relevant part:

The department [of the attorney general] shall . . .
. approve as to legality and form all documents
relating to the acquisition of any land or interest in
lands by the State

Section 107-10, HRS, provides in relevant part:

No real property or any right, title, or interest
therein shall be acquired by agreement, purchase,
gift, devise, eminent domain, or otherwise, for any
purpose, by the State or any department, agency,
board, commission, or officer thereof, without the

We advise that those statutes are not applicable to change in the ownership line caused by landward or mauka migration of the shoreline due to erosion or sea level rise. As we now show, the possibility of boundary changes due landward or mauka migration of the shoreline due to erosion and accretion is already part of the State's ownership of public trust land. That possibility already encumbers private littoral land. *Sotomura*, 55 Haw. at 183, 517 P.2d at 62. When the State comes into possession of land because of erosion or sea level rise, the State is not "acquiring" property within the meaning of the statutes.

State by Kobayashi v. Zimring, 58 Haw. 106, 566 P.2d. 725 (1977), is a key case supporting this proposition. *Zimring*

prior approval of the attorney general as to form, exceptions, and reservations.

Section 171-30, HRS, provides in relevant part:

(a) The board of land and natural resources shall have the exclusive responsibility, except as provided herein, of acquiring, including by way of dedications:

- (1) All real property or any interest therein and the improvements thereon, if any, required by the State for public purposes, including real property together with improvements, if any, in excess of that needed for such public use in cases where small remnants would otherwise be left or where other justifiable cause necessitates the acquisition to protect and preserve the contemplated improvements, or public policy demands the acquisition in connection with such improvements.
- (2) Encumbrances, in the form of leases, licenses, or otherwise on public lands, needed by any state department or agency for public purposes or for the disposition for houselots or for economic development.

The board shall upon the request of and with the funds from the state department or agency effectuate all acquisitions as provided under this section.

addressed ownership of lands newly created by a 1955 lava flow that extended the shoreline and added 7.9 acres of land in the Puna area. One of the issues in that case was whether the lava extension was ceded land acquired by the State from the federal government. The State argued that the federal government transferred the lands to the State under section 5(b) of the Admission Act. The opponents countered that the only lands that passed to the State under section 5(b) were those lands ceded to the United States by the Republic of Hawaii in 1898. They argued that the lava extension did not exist in 1898, and could not have been ceded to the United States. The Hawaii Supreme Court disagreed with the opponents and sided with the State. The Court held that the term "property," as used in the Joint Resolution of Annexation, is "extremely broad," and includes "property which is real, personal and mixed, choate and inchoate, corporal or incorporeal." *Id.* at 122-23, 566 P. 2d at 736.

The lava land was an inchoate property right in 1898. When the lava land was later created, that circumstance resulted in the ripening of State ownership of ceded land even though the land did not exist in 1898.

Napeahi v. Paty, 921 F.2d 897 (9th Cir. 1990), is on point for the proposition that an inchoate property interest in the possibility of erosion was also "public property" under the Joint Resolution of Annexation. In that case, a native Hawaiian sued the State, alleging that the State had a trust duty under the Admission Act to claim ownership of 1.75 acres shorefront property Kona. It was undisputed that "at the time the public land was ceded by the Republic of Hawaii to the United States in 1898, it did not include the 1.75 acres in contention." 921 F.2d at 902. However, that did not "end the inquiry." Relying on *Zimring* and *Sotomura*, the Ninth Circuit ruled that the land passed from private to public ownership because of erosion -- automatically and as a matter of law:

There is no reason to distinguish the inchoate property interest in submerged land that could be acquired by the State as the result of erosion from that which could be acquired by a lava extension. Both were inchoate property interests which *Zimring* held to be property that was ceded to the United States and then returned to the State in 1959. Thus, the holdings in *Sotomura* and *Zimring* require us to

conclude that if the 1.75 acres became submerged land because of natural erosion after 1898 and before being altered by the actions of the property owner, then that property would be ceded lands subject to the terms of the trust.

921 F.2d at 903.

We therefore conclude that under Hawai'i law, the State holds an inchoate right to land that may pass to it by erosion or sea level rise. This is an inherent aspect of the State's ownership of land, already owned by the State (and by the Territory before it). Ripening of that inchoate right is not "acquiring" or "acquisition" of real property under any of the statutes cited above.

This conclusion is bolstered by the Hawai'i Supreme Court's recent ruling in *Gold Coast Neighborhood Ass'n v. State*, 140 Haw. 437, 403 P.3d 214 (2017). The issue in that case was whether the State owned seawalls and land under the seawalls because the general public used the seawalls as a walkway. The State argued that under section 264-1, HRS, property could only be dedicated to the State by "deed of conveyance" accepted by the State. The State also cited to and relied on the other statutes cited above. The Court rejected this argument, holding that an "implied dedication" is not a "dedication" covered by section 264-1, HRS.

Instead implied dedication is a common law doctrine, not addressed or abrogated by section 264-1, HRS, or by the other statutes discussed above. The Court articulated a strict standard for statutory abrogation of common law rights:

The Hawaii Revised Statutes, and in particular, HRS §§ 264-1(c)(1), 171-30, 26-7, 107-10, and 520-7, do not "imperatively require" abrogation of common law implied dedication, nor do they evince an express legislative intent to do so. Minneapolis Fire & Marine Ins. v. Matson Nav. Co., 44 Haw. 59, 67-68, 352 P.2d 335, 340 (1960); Burns Int'l Sec. Servs., Inc. v. Dep't of Transp., 66 Haw. 607, 611, 671 P.2d 446, 449 (1983).

140 Haw. at 452, 403 P.3d at 229.

We believe the Court would view the statutes in the same way with respect to land gained by erosion or sea level rise -- there is no express intention to abrogate common law principles to the effect that the State owns the land without the need for affirmative action by either the Land Board or the Attorney General.

This conclusion is consistent with case law from other jurisdictions which have generally viewed a state's interest in land that may come to the public trust in the future as either a vested or contingent future interest. For example in *Severance v. Patterson*, 370 S.W.3d 705, 718 (Tex. 2012), the Texas Supreme Court said:

A person purchasing beachfront property along the Texas coast does so with the risk that her property may eventually, or suddenly, recede into the ocean. When beachfront property recedes seaward and becomes part of the wet beach or submerged under the ocean, a private property owner loses that property to the public trust.

Similarly in *Nies v. Town of Emerald Isle*, 780 S.E.2d 187 (N.C. Ct. App. 2015), *cert. denied*, 2017 WL 1550808 (U.S. Oct. 2, 2017) the court ruled against a taking claim. Under North Carolina common law the dry sand portion of plaintiffs' property had always been encumbered by the public trust. Thus enforcement of that public trust did not interfere with or "take" any pre-existing right. See generally Margaret E. Peloso & Margaret R. Caldwell, *Dynamic Property Rights: The Public Trust Doctrine and Takings in A Changing Climate*, 30 Stan. Envtl. L.J. 51, 87 (2011).

4. Does this result violate private owners' due process rights or constitute a "taking" of private property?

In *Application of Sanborn*, 57 Haw. 585, 596, 562 P.2d 771, 777-78 (1977), the Sanborns argued that the Court's ruling raised constitutional issues, including a takings claim.

The Sanborns contend that both the Hawaii and federal constitutions would be violated if this court fixes the Sanborns' title line along the upper reaches of the wash of waves. It is contended that such an adjudication would be a taking of private property for

public use without just compensation and also, by allegedly denying res judicata to the 1951 decree, would be a violation of due process per se.

The Court rejected these arguments, because its ruling was simply an application of existing Hawai'i law:

Under our interpretation of the 1951 decree, we see no constitutional infirmity. The 1951 decree recognized that the Sanbors' [sic] title extends to a line 'along high water mark'. We affirm the holding in McCandless, supra, that distances and azimuths in a land court decree are not conclusive in fixing a title line on a body of water, where the line is also described in general terms as running along the body of water.

Id. This ruling resolves the issue in state courts.

Nor are there viable federal claims, notwithstanding the suggestion to the contrary in *Sotomura v. Hawaii County*, 460 F. Supp. 473 (D. Haw. 1978). As explained in the previous section of this opinion, the possibility that private littoral land may pass into public ownership is an inherent part of the State's ownership of land. And conversely, the possibility that the seaward boundary may migrate inherently burdens private shoreline property.

This is important to the putative taking claim because the threshold question in any taking case is whether "private property" is being taken at all. As the Supreme Court put it in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1027 (1992), compensation need not be paid "if the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with."

Similarly, in *Esplanade Properties, LLC v. City of Seattle*, 307 F.3d 978, 985 (9th Cir. 2002), the Ninth Circuit denied a taking claim after determining as a threshold issue that "plaintiff's claimed property right never existed" in the first place. See also *Maritrans Inc. v. U.S.*, 342 F.3d 1344, 1351 (Fed. Cir. 2003) (In deciding whether governmental action constitutes a taking of private property without just compensation, "[f]irst, a court must evaluate whether the

claimant has established a 'property interest' for purposes of the Fifth Amendment."); *Conti v. U.S.*, 291 F.3d 1334, 1339 (Fed. Cir. 2002) ("However, if a claimant fails to demonstrate that the interest allegedly taken constituted a property interest under the Fifth Amendment, a court need not even consider whether the government regulation was a taking."); *Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 683 (6th Cir. 2004) ("[T]here is no taking if there is no private property in the first place.").

Property rights are protected by the federal and state constitutions. They are not, however, "created by the [federal] Constitution. Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law -- rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972). Cf. *Stop the Beach Renourishment, Inc. v. Florida Dept. of Env'tl. Prot.*, 560 U.S. 702, 707 (2010) ("State law defines property interests.").

As noted above, the Hawai'i Supreme Court has definitively ruled:

The loss of lands by the permanent encroachment of the waters is one of the hazards incident to littoral or riparian ownership.

Sotomura, 55 Haw. at 183, 517 P.2d at 62.

It follows that "the logically antecedent inquiry into the nature of the owner's estate shows that the proscribed use interests were not part of his title to begin with." *Lucas*, 505 U.S. at 1027. Thus there is no taking.

- 5. Is the Attorney General required to give prior approval to State ownership of land by reason of erosion or sea level rise? Is the Attorney General required to approve as to legality and form documents relating to land owned by the State by reason of erosion or sea level rise?**

As shown by the discussion of question 3, ownership of land by erosion or sea level rise occurs pursuant to the common law and is a ripening of a pre-existing inchoate right in the land. This ripening is not an acquisition of land and the State is not acquiring land within the meaning of those statutes. It follows

that the Attorney General does not have to review the ownership change and does not have to review or approve "documents relating to" the ownership.

We note that all of the cases discussed above (*Ashford*, *Sotomura*, *Sanborn*, and *Napeahi*) were decided after enactment of the three laws. None of the cases imposed the additional requirement that the Attorney General or the Board approve State ownership. In light of those cases, we do not believe the Supreme Court would require Attorney General approval. See *Gold Coast*, 140 Haw. at 455, 403 P.3d at 232: "These provisions express no intent to abrogate common law implied dedication, nor have they ever been mentioned by our courts as having any relevance to the doctrine."

Conversely, we do not believe the Court would uphold a hypothetical refusal by the Attorney General to approve ownership by reason of change in the shoreline.

6. Can the Board require the former landowner to pay fair market value in order to obtain an easement or other interest in land now owned by the State?

Not only can the Board require a former landowner to pay fair market value, but it must do so under current law. Applicable statutes specifically require fair market value in most cases. See, e.g., section 171-13, HRS (requiring that easements be sold for fair market value determined pursuant to section 171-17(b), HRS).

This requirement could be changed by the Legislature. We understand that the Department has introduced appropriate legislation but has not been successful.

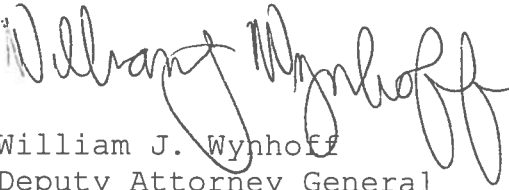
CONCLUSION

For these reasons, we conclude that the State owns additional public land resulting when the shoreline has migrated landward or mauka due to erosion or sea level rise, that this migration does not give rise to a constitutional claim by the former owner, that this result is not affected by laws relating to the acquisition of real property, that the Attorney General

The Honorable Suzanne D. Case
December 11, 2017
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does not need to give prior approval in connection with such land, and that the Board can and should charge former owners fair market value in return for an easement interest in the land.

Very truly yours,



William J. Wynhoff
Deputy Attorney General

APPROVED:



Douglas S. Chin
Attorney General

WJW:w

**STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
Honolulu, Hawai'i**

October 13, 2017

**Board of Land and
Natural Resources
State of Hawai'i
Honolulu, Hawai'i**

REGARDING: Conservation District Enforcement File OA-18-06
Alleged Unauthorized Land Uses in the Conservation District

BY: James O'Shea and Denise O'Shea
Trustees of the James and Denise O'Shea Trust

LOCATION: 59-171 D Kē Nui Road, Pūpūkea, Ko'olauloa, Island of O'ahu

TAX MAP KEY: (1) 5-9-002:025 (Seaward)

SUBZONE: Resource

DESCRIPTION OF AREA:

The subject area is located on the north shore of the island of O'ahu, west of Sunset Beach and seaward of Tax Map Key (1) 5-9-002:025 (**Exhibit 1 and 2**). The private property is located in the State Land Use Urban District up to the highest wash of the waves. Lands seaward of where the shoreline would likely be determined, based on Hawai'i Revised Statutes (HRS) §205A-1 and Hawai'i Administrative Rules (HAR) §13-222 *Shoreline Certifications*, are located in the Conservation District Resource Subzone. The beach area is set aside to the City and County of Honolulu, Department of Parks and Recreation as the Pūpūkea to Paumalū (Sunset) Beach Park, under Governor's Executive Order # 2598 (see Exhibit 1).

A single-family residence is located on the subject property. The neighboring properties to the south are fronted by wood bulkhead seawall structures. The neighboring property to the north is fronted by a concrete seawall which has partially failed, about 15 to 20 percent of the seawall has collapsed. These few houses are the only properties with shoreline armoring along this stretch of Sunset Beach.

The beach is exposed to swells from the north Pacific in the winter months and easterly tradewind waves year-round. The beach is composed of carbonate coarse sand and characterized by occasional outcrops of limestone that are intermittently buried or exposed by shifting sand. Long-term shoreline change rates in the vicinity of the subject property have trended towards chronic recession (approximately 0.5 to 0.6 feet per year) (**Exhibit 3**), although the long-term rate calculations are complicated by shorter-term, seasonal variations in shoreline position. Northeast tradewind waves, predominant in summer, tend to drive sand from this area (erosion) and west to northwest swell, predominant in winter, tends to move sand into this area (accretion) (**Exhibit 4 and 5**).

Short-term (episodic) erosion is a significant hazard to beach-front homes in the area with rapid sand loss and wave run-up from large waves. Such hazards would be expected in an environment of this type because the homes are built on top of the frontal sand dune. The sand dune may be more accurately characterized as a high wave berm because the underlying sediments appear to be predominantly coarse-grained, suggesting deposition by waves, not wind.

CHRONOLOGY:

August 24 and 28, 2017 – Department of Land and Natural Resources (DLNR) staff conducted a site inspection of the area. Seawall was intact in front of subject property and no boulders were present (**Exhibit 6 and 7**).

September 3, 2017 – Subject seawall collapsed, according to the neighbors.

September 5, 2017 – DLNR staff conducted a site inspection of the area and observed the failed seawall. Construction crew was observed digging a trench in front of the failed structure (**Exhibit 8**). Department of Conservation and Resource Enforcement (DOCARE) and City and County of Honolulu, Code Compliance Branch were notified.

September 6, 2017 – DLNR notified by adjacent neighbor to the north that the subject seawall has failed completely and 15 to 20 percent of adjacent seawall to the north has failed.

September 8, 2017 – DLNR staff and a DOCARE Officer conducted a site inspection and observed an operator on a backhoe machine working with a pile of boulders on the seaward side of the subject property (**Exhibit 9**). It appeared that the boulders had been recently placed on the beach seaward of the failed seawall. DLNR staff notified the construction crew that the landowner did not have permits for land uses in the Conservation District and suggested they stop work. An Alleged Violation and Order was left in the landowner's mailbox at 3:45pm (**Exhibit 10**). Mr. O'Shea called DLNR staff and was informed of the alleged violation and the potential consequences. He agreed to stop work.

September 13, 2017 – DOCARE Officer conducted site inspection of the subject property and observed the boulders still present on the beach.

September 14, 2017 – DLNR staff conducted site inspection of the subject property and observed the boulders still present on the beach (**Exhibit 11**).

September 15, 2017 – DLNR received complaint that additional boulders were placed on the beach and work has been taking place throughout the week.

September 16, 2017 – DOCARE Officer conducted a site inspection of the subject property and observed machinery on the beach. The construction crew had stacked additional boulders and placed soil (sand and fill material) on the beach on top of the existing boulders. It appeared the construction team was stacking the boulders in a wall-like structure (**Exhibit 12**).

September 18, 2017 – DLNR staff conducted a site inspection and observed ongoing work with machinery on the beach. The pile of sand and fill material was still present on the beach (**Exhibit 13**).

September 20, 2017 – DLNR staff conducted a site inspection and observed ongoing work with machinery on the beach. The boulders and the pile of sand and fill material were still present. (**Exhibit 14**).

September 22, 2017 – A Temporary Restraining Order (**Exhibit 15**) was granted to stop all construction activities on the seawall through October 2, 2017.

ALLEGED UNAUTHORIZED LAND USE IN THE CONSERVATION DISTRICT:

The DLNR has jurisdiction over land lying seaward of the shoreline as evidenced by the upper reaches of the wash of the waves other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limits of debris left by the wash of the waves, pursuant to HRS §205A-1.

Staff believes the unauthorized land uses occurred within the Conservation District based upon the location of the work seaward of the O'Shea's property. The Office of Conservation and Coastal Lands (OCCL) believes there is sufficient cause to bring this matter to the Board of Land and Natural Resources (BLNR) since it is evident that the unauthorized land uses are within the Conservation District pursuant to the HAR §15-15-20 *Standards for determining "C" conservation district boundaries*:

It shall include lands having an elevation below the shoreline as stated by HRS §205A-1 marine waters, fishponds, and tidepools of the State, and accreted portions of lands pursuant to HRS §501-33 unless otherwise designated on the district maps. All offshore and outlying islands of the State are classified conservation unless otherwise designated on the land use district maps.

HAR §13-5 and HRS §183C regulate land uses in the Conservation District by identifying a list of uses that may be allowed by a Conservation District Use Permit (CDUP). The chapters also provide for penalties, collection of administrative costs and damages to State land for uses that are not allowed or for which no permit has been obtained. HAR §13-5-2 defines "land use" as follows:

The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs.

The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land.

The work that was conducted consisted of excavation (grading) and placement of materials, including large boulders, concrete and rebar debris and soil, within the Conservation District, Resource Subzone. Since the work would normally qualify as a land use under the Conservation District definition (HAR §13-5-2), some type of permit or approval should have been obtained by the alleged.

Pursuant to HRS §183C-7, the maximum fine for a Conservation District violation is \$15,000.00 per violation in addition to administrative costs. If the alleged fails to immediately cease such activity after

written or verbal notification from the department, willful violation may incur an additional fine of up to \$15,000.00 per day per violation for each day in which the violation persists.

Under the Penalty Guideline Framework that was approved by the BLNR (**Exhibit 16**) this action is considered "Major" since the identified land use would require a permit approved by the BLNR under the permit prefix "D". This violation follows a penalty range of \$10,000 to \$15,000. The comparable identified use in HAR §13-5 would be "Shoreline Erosion Control" for which a permit approved by the BLNR is normally required.

Therefore, under the Penalty Guideline Framework this unauthorized land use is considered:

1. Major harm to resource or potential harm to resource; and
2. Major comparable harm to resource.
3. Continuing violations.

Under the penalty guidelines, examples of "major harm(s) to the resource" may include actions that cause substantial adverse impact to existing natural resources within the surrounding area, community, ecosystem or region, or damage to the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Such actions may include, but are not limited to, unauthorized single-family residences or unauthorized structures, **grading or alteration of topographic features**, aquaculture, major marine construction or dredging, **unauthorized shoreline structures**, major projects of any kind, mining and extraction, etc."

In addition, under the "Containing Violations" guideline, "Each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense."

DISCUSSION:

Coastal erosion occurs as a result of the following phenomena: 1) Seasonal changes in waves and currents that move sand alongshore or across the shore, adjusting the beach profile; 2) Long-term (chronic) deficiencies in natural sand supply and/or fluctuations in meteorological or oceanographic processes such as storms and sea level rise; and 3) Human impacts to sand availability through sand impoundment and supply disruption from development and coastal engineering.

Development on beaches and dunes has contributed to narrowing and loss of beaches in Hawai'i, degrading recreational areas, habitat and natural storm protection that "healthy" beaches and dunes can provide. Beach narrowing and loss fronting shoreline armoring (the construction of vertical seawalls or sloping stone revetments along a shoreline to protect coastal lands from marine erosion) also severely restricts public access to State Conservation land and the natural resources. Seawalls impound natural sand supplies that would otherwise be available to nourish an eroding beach, increasing rates of beach narrowing and loss (**Exhibit 17**).

Unfortunately, many of Hawai'i's beaches have been degraded or lost from a combination of natural erosion and inappropriate coastal development including inappropriate shoreline armoring, shallow lot shoreline subdivisions and development built too close to the shoreline. According to a 2012 study by

University of Hawai'i and U.S. Geological Survey researchers, 70 percent of all beaches measured in the Hawaiian Islands indicated an erosion trend. More than 21 km or 9 percent of the total length of the beaches studied were lost to erosion. In nearly all cases of beach loss, the beaches were replaced with seawalls or other coastal armoring structures.

The beaches of the North Shore of O'ahu, also referred to as the "Seven Mile Miracle", are some of Hawai'i's most unique and valued natural resources. The North Shore is famous for world-class big wave surfing and hosts a series of top-level surfing contest each winter, attracting thousands of international contestants and spectators. Beaches are an essential natural resource and economic engine for the North Shore community. Most of the beaches along this stretch of shoreline are still healthy because of the abundance of sand, but some sandy areas are at risk due to chronic and seasonal erosion, shallow lot shoreline subdivisions and development built too close to erosion and inundation-prone shorelines. Increasing sea level rise will increase risks to beaches and shore-front development in the coming decades. The State and City should resist the temptation to allow further shoreline armoring in this area; as such actions will ultimately degrade the sandy beach.

The erosion that occurred in the vicinity of the subject property this summer was an extreme case of the normal cycle of seasonal change for North Shore beaches, which may have been worsened by higher than normal water levels, extreme high tides and/or longer-term deficiencies in sand supply.

The unauthorized land uses, including the use of heavy machinery, placement of the boulders, soil, and concrete and rebar debris, that were conducted by the O'Sheas pose a significant threat to the beach and the public. The land uses were conducted without proper authorizations and an environmental review process. The materials extend seaward of the shoreline within the Conservation District, inhibiting lateral shoreline access and affecting recreational activities. During construction work, clay, soil and construction debris was released into the ocean creating hazardous conditions for ocean users and plumes extending offshore (**Exhibit 18**).

It is currently unclear whether the seawall is located on State land or private property. A survey of the shoreline is necessary. However, debris and construction activity related to the seawall clearly occurred on State Conservation District land.

The beaches of Hawai'i are held in trust by the State for the benefit of present and future generations. The landowners of the subject property acted without authorization from the DLNR or the City and County of Honolulu. The State should be involved when individuals seek to construct any shoreline structure seaward of the shoreline; and there should be consequences when an individual unilaterally acts in such a way that endangers and potentially damages a public trust resource.

On August 27, 1999, the BLNR adopted the Hawai'i Coastal Erosion Management Plan (COEMAP) as an internal policy for managing shoreline issues including erosion and coastal development in Hawai'i (**Exhibit 19**). COEMAP still serves as the primary shoreline policy for the DLNR and recommends a number of strategies to improve our State's management of coastal erosion and beach resources.

However, COEMAP's scope is of a general nature, more focused on broader government policy than erosion management practices. The COEMAP effort is guided by the doctrine of sustainability promoting the conservation, sustainability, and restoration of Hawai'i's beaches for future generations. When assessing cases involving unauthorized shoreline structures the Department has implemented a "no tolerance" policy concerning unauthorized shoreline structures constructed after the adoption of

COEMAP. Based on this policy, the OCCL recommends that the materials be removed and the beach restored to its pristine condition. The decision to remove unauthorized uses has been established by previous BLNR decisions on matters similar to this one.

The OCCL strives to provide guidance and assistance to landowners that are subject to coastal hazards. Once this violation case is resolved, the OCCL would gladly assist the landowners in considering next steps.

Staff believes that the landowner should be fined the maximum penalty in five instances (\$15,000 x 5 = \$75,000) for the unauthorized land uses. DLNR documented the (5) days of continuing work despite verbal and written orders to cease work. In addition, Staff will recommend administrative penalties. Staff recommends the landowner be required to remove the unauthorized materials in their entirety and clean and restore the site to a condition acceptable to the Department.

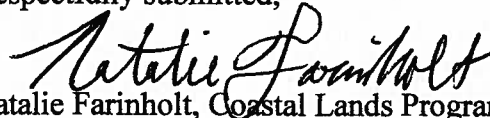
This submittal and notice of the BLNR's meeting shall be sent to the property's landowners by certified mail to the address on record.

AS SUCH, STAFF RECOMMENDS:

That pursuant to HRS Sec. 183C-7 and HAR Sec. 13-5-6, the BLNR finds the property owner(s) of TMK: (1) 5-9-002:025 in Pūpūkea, Ko'olauloa, O'ahu, in violation of HRS Sec. 183C-6 and HAR Sec 13-5-30, subject to the following:

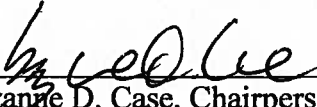
1. The Landowner is fined \$75,000 for the unauthorized land uses;
2. The Landowner is fined an additional \$2,500.00 for administrative costs associated with the subject violation;
3. The Landowner shall pay all fines (total \$77,500) within thirty (30) days of the date of the BLNR's action;
4. The Landowner shall be required to remove debris and clean the site to the satisfaction of the DLNR;
5. That in the event of failure of the landowners to comply with any order herein, the landowner shall be fined an additional \$15,000.00 per day until the order is complied with; and
6. That in the event of failure of the landowners to comply with any order herein, the matter shall be turned over to the Attorney General for disposition, including all administrative costs.
7. The Department reserves the right to assert additional claims after a shoreline survey is completed and more information is received regarding the property lines.

Respectfully submitted,

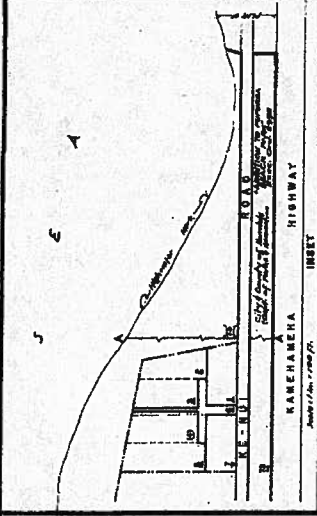


Natalie Farinholt, Coastal Lands Program Specialist
Office of Conservation and Coastal Lands

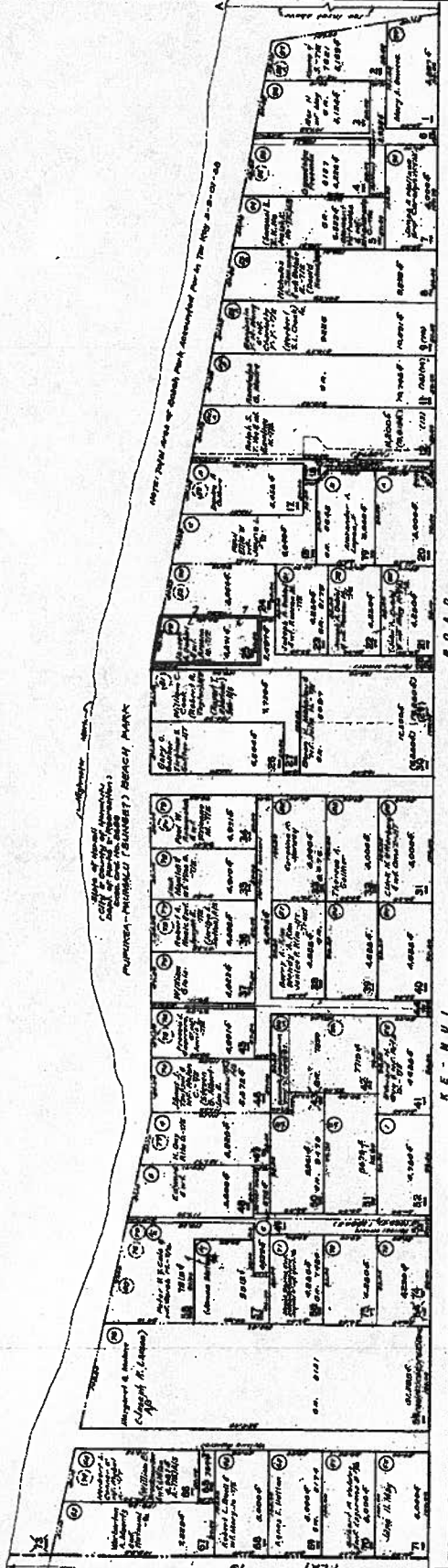
Approved for submittal:



Suzanne D. Case, Chairperson
Board of Land and Natural Resources



S E A



PLAT 19

KAMAHAMUA HIGHWAY

PLAT 18

SUBJECT TO CHANGE

5 9 02

TAX MAP

PLAT 18

PLAT 19

PLAT 20

PLAT 21

PLAT 22

PLAT 23

PLAT 24

PLAT 25

PLAT 26

PLAT 27

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PLAT 99

PLAT 100

EXHIBIT 1

EXHIBIT 2



59-171 D Ke Nui Road

Google earth

400 ft

Sunset Beach, Oahu, Hawaii

AREA DESCRIPTION

The shoreline bordering the community of Sunset Beach (transects 118–255) on the north shore of Oahu is the site of world famous big wave surf breaks including Sunset and Waiyapan. The area is exposed to swells from the north Pacific in winter months and easterly trade-wind waves year-round. Sunset Beach is the central portion of a continuous (4 mi long) beach composed of carbonate sand, and characterized by occasional outcrops of limestone that may be intermittently buried or exposed by shifting sand.

Shoreline change rates at Sunset Beach (1928–2008) are mostly low (<1 ft/yr). Large winter swell causes dramatic changes in shoreline position that largely recover the following season. Because of this, shoreline change rates at Sunset Beach have high uncertainty due to short-term variations in shoreline position. Despite wide variations in beach width, the vegetation line has remained approximately stable since 1928. The high rate uncertainty and stable vegetation line suggest that the shoreline has remained approximately stable over the long-term or that seasonal variations are masking the true long-term change. These characteristics may also reflect shoreline stabilization by armoring that holds the vegetation line in place.

Short-term erosion is a significant hazard to beach-front homes, especially in winter with run-up from large waves. A number of beach-front homes were destroyed during a massive winter 1959 swell.

Previous studies by Hwang (1981) and Geo Engineering (1988) found little net change or small seaward growth of the vegetation line at Sunset Beach 1949–1988, except at Sunset Beach Park and at the west end of Kaunalea Beach where the vegetation line eroded. The vegetation line has since recovered at Kaunalea Beach (1989–2008).

For more information see: <http://www.soest.hawaii.edu/spot/coast/oahu/>

Hwang, D. (1981) "Beach changes on Oahu as revealed by aerial photographs." State of Hawaii, Department of Planning and Economic Development.
Geo Engineering (1988). "Oahu shoreline study." City and County of Honolulu, Dept. of Land Utilization.

SHORELINE CHANGE RATES

- Accretion Rate
- Erosion Rate

Historical shoreline positions are measured every 66 ft along the shoreline. These sites are denoted by yellow shore-perpendicular transects. Changes in the position of the shorelines through time are used to calculate shoreline change rates (ft/yr) at each transect location.

Annual shoreline change rates are shown on the shore-parallel graph. Red bars on the graph indicate a trend of beach erosion, while blue bars indicate a trend of accretion. Approximately every fifth transect and bar of the graph is numbered. Where necessary, transects have been purposely deleted to maintain consistent along-shore spacing. As a result transect numbering is not consecutive everywhere.

The ET method is used to calculate shoreline change rates for the study area. The rates are smoothed along shore using a 1-3-6-3-1 technique to normalize rate differences on adjacent transects. For more information on erosion rate methods and results see: <http://www.soest.hawaii.edu/spot/coast/oahu/index.asp>

HISTORICAL SHORELINES

- 1928
- T-sheet 1932
- May 1949
- Sep 1961
- Apr 1967
- Jan 1971
- Apr 1976
- Jun 1976
- Feb 1988
- Jul 1988
- Jul 2008

Erosion rate measurement locations (shore-normal transects)

Historical beach positions, color coded by year, are determined using orthorectified and georeferenced aerial photographs and National Ocean Survey (NOS) topographic survey charts. The low water mark is used as the historical shoreline, or shoreline change reference feature (SCRF).

Movement of the SCRF along shore-normal transects (spaced every 66 ft) is used to calculate erosion rates.

Oahu



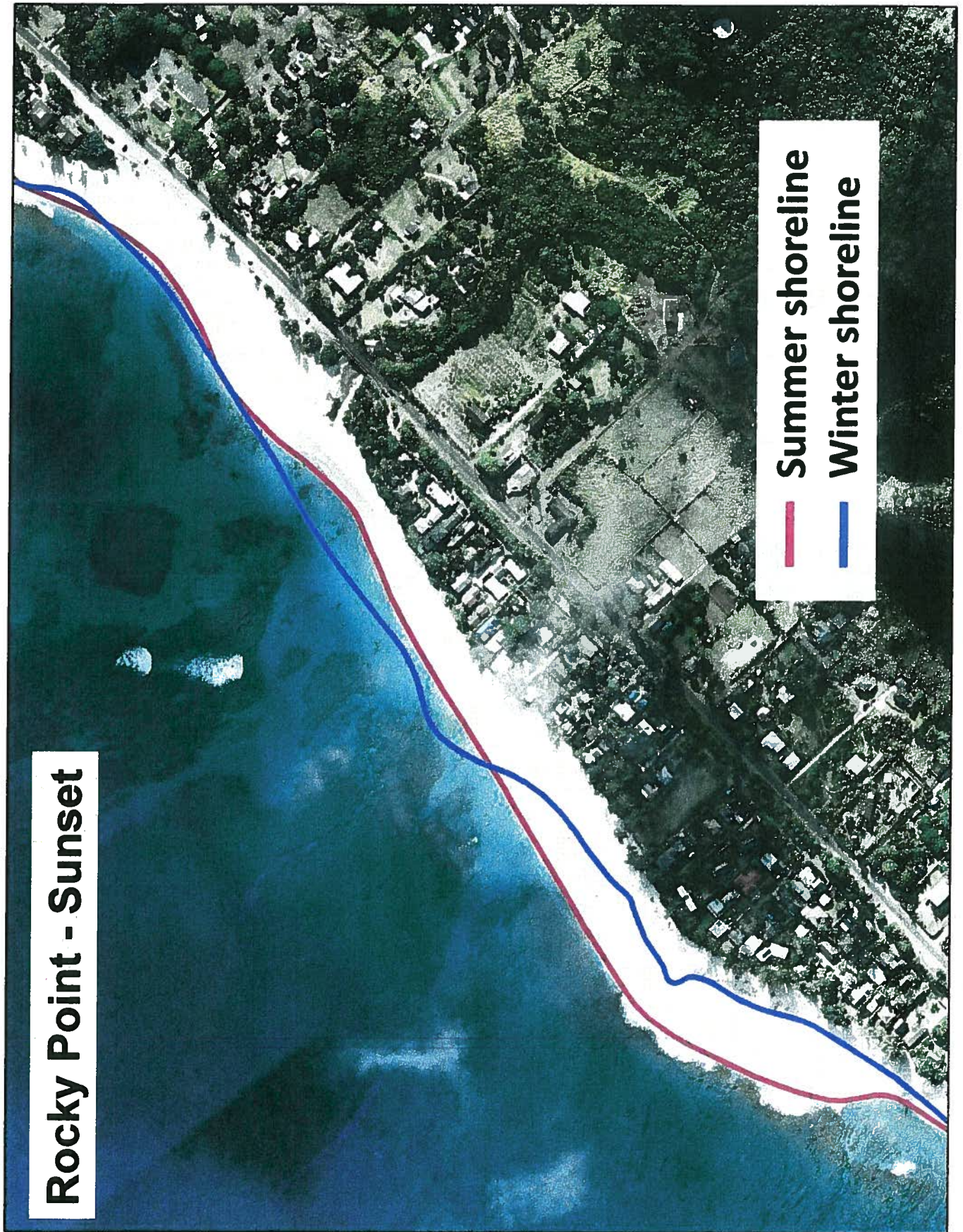


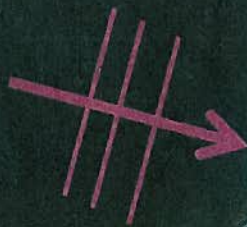
EXHIBIT 4

Rocky Point – Sunset Beach Erosion

Winter:
W – NW swell



Summer - Fall:
NE tradewind waves,
N swell



Sunset

Kammies

Rocky Point

Paumotu Str

Affected area 1

Affected area 2

© 2013 Google

Google earth

Imagery Date: 1/29/2013 21°40'25.25"N 158°02'34.62"W elev: 41 ft eye alt: 4222 ft

August 24, 2017



EXHIBIT 6

August 28, 2017



EXHIBIT 7

September 5, 2017



EXHIBIT 8

September 8, 2017

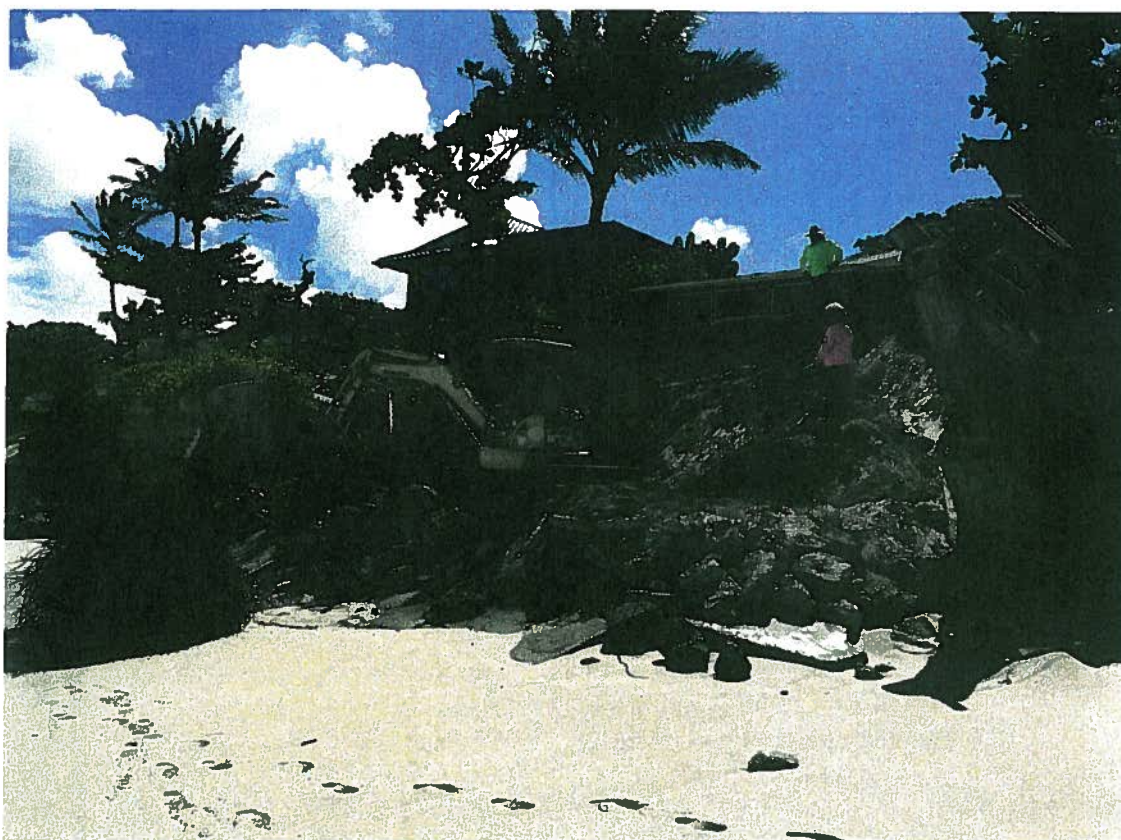


EXHIBIT 9

DAVID Y. IGE
GOVERNOR OF HAWAII



STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
OFFICE OF CONSERVATION AND COASTAL LANDS
POST OFFICE BOX 621
HONOLULU, HAWAII 96809

SUZANNE D. CASE
CHAIRPERSON
BOARD OF LAND AND NATURAL RESOURCES
COMMISSION ON WATER RESOURCE MANAGEMENT

ROBERT K. MASUDA
FIRST DEPUTY

JEFFREY T. PEARSON, P.E.
DEPUTY DIRECTOR - WATER

AQUATIC RESOURCES
BOATING AND OCEAN RECREATION
BUREAU OF CONVEYANCES
COMMISSION ON WATER RESOURCE MANAGEMENT
CONSERVATION AND COASTAL LANDS
CONSERVATION AND RESOURCES ENFORCEMENT
ENGINEERING
FORESTRY AND WILDLIFE
HISTORIC PRESERVATION
KAHOOLAWE ISLAND RESERVE COMMISSION
LAND
STATE PARKS

REF:OCCL:SL

ENF: OA 18-06

CERTIFIED MAIL/RETURN RECEIPT
7014 2120 0003 1908 2369

James and Denise O'Shea Trust
59-171 D Ke Nui Road
Hale'iwa, HI 96712

SEP - 8 2017

SUBJECT: Alleged Unauthorized Land Use within the Conservation District Located Makai of
59-171 D Ke Nui Road, Hale'iwa, O'ahu
Tax Map Key: (1)5-9-002:025

Dear Landowner:

It has come to the Department of Land and Natural Resources (DLNR), Office of Conservation and Coastal Lands' (OCCL) attention that alleged unauthorized land uses consisting of the placement of large rocks and concrete rubble as a shoreline erosion control measure may have occurred in the shoreline area fronting the subject property.

NOTICE IS HEREBY GIVEN you may be in violation of Hawaii Administrative Rules (HAR) Title 13, Chapter 5, entitled Conservation District providing for land uses within the Conservation District, enacted pursuant to the Hawaii Revised Statutes (HRS), Chapter 183C.

The Department of Land and Natural Resources (DLNR) has determined that:

1. The location of the alleged unauthorized land use is located makai of TMK (1) 5-9-002:025 and is located within the State Land Use Conservation District, Resource Subzone;
2. A site inspection conducted by Staff on September 8, 2017 revealed a mini excavator placing rocks and concrete rubble within the shoreline area fronting the subject property in what appears to be a make-shift seawall for shoreline erosion control purposes [EXHIBIT 1];
3. Pursuant to §13-5-2, HAR, "Land use" means:
 - (1) The placement or erection of any solid material on land if that material remains on the land more than thirty days, or which causes a permanent change in the land area on which it occurs;

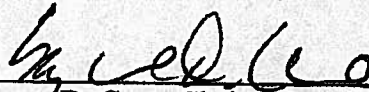
EXHIBIT 10

- (2) The grading, removing, harvesting, dredging, mining, or extraction of any material or natural resource on land; and
4. This land use was not authorized by the Department of Land and Natural Resources under Chapter 13-5, HAR.

Pursuant to 183C-7, HRS, the Board of Land and Natural Resources (Board) may subject you to fines of up to \$15,000.00 per violation in addition to administrative costs. Should you fail to immediately cease such activity after written or verbal notification from the department, willful violation may incur an additional fine of up to \$15,000.00 per day per violation for each day in which the violation persists.

Please respond to this Notice within 15-days. Please note any information provided may be used in civil proceedings. Should you have any questions, contact Sam Lemmo, Administrator of the Office of Conservation and Coastal Lands at (808) 587-0377.

Sincerely,



Suzanne D. Case, Chairperson
Board of Land and Natural Resources

Attachment

C: ODLO
DOCARE-O'ahu
C&C, DPP



EXHIBIT 10

EXHIBIT 1

September 14, 2017

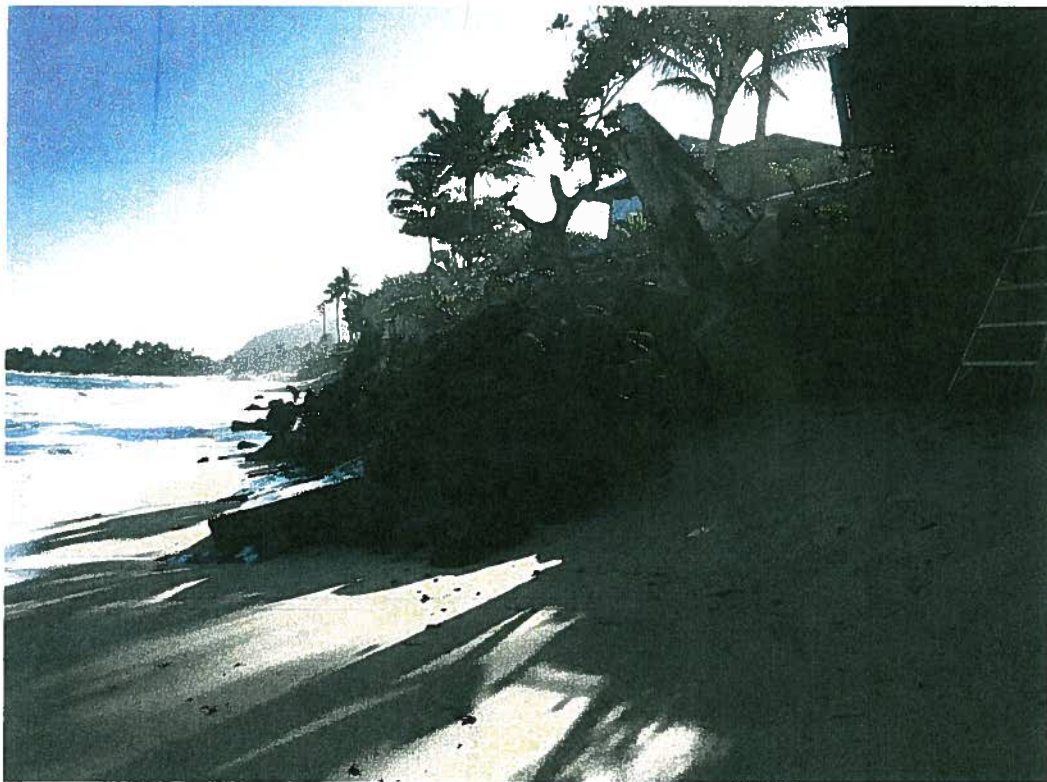


EXHIBIT 11

September 16, 2017



EXHIBIT 12

September 18, 2017



EXHIBIT 13

September 20, 2017



EXHIBIT 14

10:25 o'clock a.m.
Sept. 22, 2017
Rachel TSY
Clerk

DOUGLAS S. CHIN 6465
Attorney General of Hawaii

WILLIAM J. WYNHOFF 2558
AMANDA J. WESTON 7496
Deputy Attorneys General
Department of the Attorney General,
State of Hawai'i
465 S. King Street, 3rd Floor
Honolulu, Hawaii 96813
Telephone: (808) 587-2985
Attorneys for Plaintiff

IN THE CIRCUIT COURT FOR THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

vs.

JAMES O'SHEA AND DENISE O'SHEA as
Trustees of the James and Denise O'Shea
Trust and DENISE O'SHEA AND JAMES
O'SHEA, individually, and JOHN AND
JANES DOES 1 -10,

Defendant.

17-1-1543-09 JPC
CIVIL NO. ~~06-1-0013-01~~ KSSA

ORDER GRANTING PLAINTIFF'S
MOTION FOR TEMPORARY
RESTRAINING ORDER FILED
SEPTEMBER 22, 2017

DATE: September 22, 2017

TIME: 10:00 a.m.

JUDGE: Hon. Jeffrey P. Crabtree

ORDER GRANTING PLAINTIFF'S MOTION FOR
TEMPORARY RESTRAINING ORDER FILED SEPTEMBER 22, 2017

The Plaintiff's Motion for Temporary Restraining Order filed September 22, 2017, having come on for hearing on September 22, 2017, at 10:00 a.m., before the Honorable Jeffrey P. Crabtree, Amanda J. Weston, Deputy Attorney General, appearing for Plaintiff State of Hawai'i, and Defendants James O'Shea and Denise O'Shea appeared in person, and

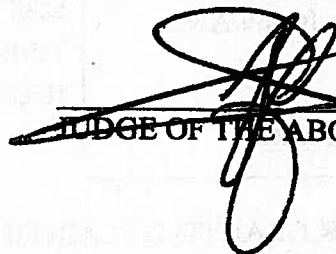
The court having considered the motion, and the memoranda, declarations and exhibits filed in support and opposition to the motion, as well as the oral argument of counsel, finds and concludes that

1. There is a sufficient likelihood that Plaintiff may prevail on the merits;
2. The Plaintiff would be irreparably harmed as if the motion is not granted;
3. The public interest supports granting the temporary restraining order Plaintiff seeks.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that Plaintiff's Motion for Temporary Restraining order filed on September 22, 2017 is GRANTED as follows:

Defendants will stop all construction activities on the seawall through October 2, 2017.

DATED: Honolulu, Hawaii, SEP 22 2017.


JUDGE OF THE ABOVE-ENTITLED COURT

APPROVED AS TO FORM:

JAMES O'SHEA

DENISE O'SHEA

**CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE
GUIDELINES AND ASSESSMENT OF DAMAGES TO PUBLIC LAND OR
NATURAL RESOURCES**

September 2009

Relating to penalties for violations within the Conservation District

Act 217

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APPENDIX A: GUIDELINE FRAMEWORK TABLES

APPENDIX B: DEFINITIONS

APPENDIX C: REFERENCES

APPENDIX D: DAMAGES EXAMPLES

APPENDIX E: PENALTY CALCULATION WORKSHEET

1 INTRODUCTION

Hawaii Revised Statutes (HRS) §183C-7 was amended on July 7, 2008 to increase the maximum penalty for a Conservation District violation to up to \$15,000 per violation, in addition to administrative costs, costs associated with land or habitat restoration, and damages to public land or natural resources, or any combination thereof.

This document, *Conservation District Violation Penalties Schedule Guidelines and Assessment of Damages to Public Land and Natural Resources* is intended to provide the Office of Conservation and Coastal Lands (OCCL) with a framework to systematically carry out its enforcement powers, in the determination and adjudication of civil and administrative penalties. These guidelines are to be used for internal staff guidance, and should be periodically reviewed to determine their effectiveness, and whether refinements are needed. These guidelines are consistent with HAR §13-1, Subchapter 7, Civil Resource Violation System (CRVS).

2 CONSERVATION DISTRICT VIOLATION PENALTIES SCHEDULE GUIDELINES

The charging and collecting of penalties is an enforcement tool that may be used to ensure future compliance by the responsible party and others similarly situated. The penalty amount(s) shall be enough to ensure immediate compliance with HAR §13-5 and HRS §183C, and cessation of illegal activities. Penalties will be assessed for each action committed by an individual(s) that conducts an unauthorized land use and that impairs or destroys natural resources protected under Chapter §183C, HRS.

The Staff will treat each case individually when assigning conservation district penalties using the following framework, and additional considerations and factors for upward or downward adjustments. The staff of the OCCL (Staff) will use these penalty schedule guidelines to issue violation notices and to make recommendations to the Board of Land

and Natural Resources (Board), Chairperson of the Board of Land and Natural Resources (Chairperson), or Presiding Officer, whom may ultimately adjudicate the Conservation District penalties. These guidelines presume that all cases in which a violation has occurred, the Chairperson, Board, or Presiding Officer may also assess administrative costs, damages to public land or natural resources, and costs associated with land or habitat restoration.

2.1 PENALTY CALCULATION

The penalty range for these actions will be substantially determined based on the type of permit that would have been required if the individual(s) had applied to the Department of Land and Natural Resources (Department) or Board for pre-authorization to conduct the identified use, under Hawaii Administrative Rules (HAR) §13-5-22, 23, 24, 25. Assessing the penalties according to the Conservation District permit type accounts for the level of review or scrutiny the unauthorized use would have received by the Department or Board in order to avoid damage to the natural resource. This graduated permit review framework corresponds to the level of actual or potential "harm to the resource"¹ caused by the violation.

Once the baseline for the penalty range has been established according the required permit, the penalty may be adjusted appropriately upward or downward according to the "harm to resource" caused or potentially caused by the violator's action and additional considerations and factors (See 2.1.4),² within the assigned penalty range. Where Staff was unable to associate the unauthorized use with a typical land use identified in HAR §13-5, Staff may try to associate the action with the most similar identified land use in HAR §13-5, or according to the "harm to the resource" caused by the violation. Table 1

¹ "Harm to resource" is an actual or potential impact, whether direct or indirect, short or long term, impact on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, alteration, disturbance, or landscape alteration (See Appendix B: Definitions) Adapted from *Florida Department of Environmental Protection 2009 Administrative Process and Damage Liability*, Ch. G35-54.

² Penalty amounts may be adjusted up or down, based on additional considerations, such as the actual extent of the direct damages, significance of any other indirect impacts, environmental record of the violator, responsiveness of violator, etc. (See 2.1.4 Additional Considerations and Factors).

was created to demonstrate the penalty ranges for the type of required permit and "harm to resource" (See 2.1.1 or Appendix A).

The first two of the following sections explain the identified and non-identified land use framework. The next four sections: Tree Removal, Additional Considerations and Factors, Continuing Violations and Permit Non-Compliance, and In-Kind Penalties, provide guidance for the upward or downward adjustment of penalties based on the initial framework discussed in Section 2.1.1. Identified land use penalties.

2.1.1 Identified Land Use Penalties

The violation penalty range associated with each required permit will be assessed in accordance with the following harm to resource indices in this graduated framework.

Table 1. Penalty Guideline Framework

Harm to resource or potential for harm to resource	Identified land use permit guideline with the letter	Penalty Range
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

Major Harm to the Resource/ Board Permit (D)

Violations identified with the required permit prefix (D) may incur a penalty in the range of \$10,000 - \$15,000 as a Board permit would have been required to minimize the possibility of causing "major harm to the resource." Examples of "major harm(s) to the resource" may include actions that cause substantial adverse impact to existing natural resources within the surrounding area, community, ecosystem or region, or damage to the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics. Such actions may include, but are not limited to, unauthorized single-family residences or unauthorized structures, grading or alteration of topographic features, aquaculture, major marine construction or dredging, unauthorized shoreline structures, major projects of any kind, mining and extraction, etc.

Moderate Harm to the Resource/Departmental Permit (C)

Violations identified with the required permit prefix (C) may incur a penalty in the range of \$2,000-\$10,000, as a Departmental permit would have been required, due to the possibility of causing "moderate harm to the resource." Examples of "moderate harm(s) to the resource" may be adverse impacts that degrade water resources, degrade native ecosystems and habitats, and/or alter the structure or function of a terrestrial, littoral or marine ecosystem. Such actions may include, but are not limited to, unauthorized landscaping causing ground disturbance, unauthorized alteration, renovation or demolition of existing structures or facilities, such as buildings and shoreline structures, maintenance dredging, agriculture, and animal husbandry, etc.

Minor Harm to the Resource/Site Plan Approval (B) Permit

Violations identified with the required permit prefix (B) may incur penalties as a site plan approval would have been required to assure that "minor harm(s) to the resource" are minimized. "Minor harm(s) to the resource" may incur a penalty of \$1,000-\$2,000 and could be actions causing limited to short-term direct impacts including, but not limited to, small-scaled construction, construction of accessory structures, installation of temporary or minor shoreline activities or similar uses.

Very Minor Harm to the Resource/(B) Permit

In instances in which a permit with the B prefix should have been sought but are considered to have only caused "very minor harm(s) to resource" a penalty of up to \$1,000 may be incurred. These "very minor harm(s) to the resource" could be actions in which the impact on the water resource or terrestrial, littoral or marine ecosystem was temporary or insignificant, and was not of a substantial nature either individually or cumulatively.

2.1.2 Non- Identified Land Use Penalties

Violations in which an unauthorized use is not identified in HAR §13-5-22, 23, 24, 25, Staff may try to associate the action with the most similar identified land use in HAR

§13-5 or according to the "harm to the resource" caused by the violation. Refer to the above section, *Identified Land Use Penalties*, for the most similar required permit prefix. To categorize the violation as a "harm to resource" when no similar use is identified in HAR §13-5, Staff will refer to Table 1 and the definitions of the four violation types of "harm to resource" (See Appendix B: Definitions).

2.1.3 Tree Removal

Violation penalties for the removal of any federal or state listed threatened, endangered, or commercially valuable tree may incur a fine of up to \$15,000 per tree. Removal of any native tree may incur a fine of up to \$1,000 per tree. The removal of any invasive tree shall be considered as removal/clearing of vegetation.

The Board, Department, or Presiding Officer also has the option of considering the removal of more than one tree as a single violation, similar to the removal/clearing of vegetation.² If violation is considered as one violation, a fine amount of up to \$15,000 may be incurred, utilizing the guidelines for Major, Moderate, Minor, and Very Minor outlined in this schedule. However, the removal of any federally or state listed threatened or endangered tree shall be considered on a one violation per tree basis, with a maximum penalty of up to \$15,000 per tree.

2.1.4 Vegetation Removal/Vegetation Clearing

Past Staff recommendations and Board decisions have treated some cases of tree or removal as one citation of vegetation clearing/vegetation removal, this practice may be continued in violations resulting in minor or very minor harm to the resource. In accordance with the identified land uses within HAR §13-5 the assessment of vegetation removal has been based on a single citation of removal/clearing determined by the square footage of vegetation removed (See Table 3 Vegetation Removal). However, the

² While Staff and Board decisions in MA-01-09, CA-03-40 and HA-06-08 have treated the removal of non-native, invasive, or sensitive trees as one citation of "clearing" with secondary translocation plans.

Department may see fit to assess the removal/clearing of threatened, endangered, or commercially valuable plants similar to the modified tree removal framework and may be penalized on an individual plant basis of up to \$15,000 per plant.

Table 3. Vegetation Removal

Action	Commensurate Harm to Resource	Penalty Range
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation of or > 1,000-10,000 sq. ft. of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 1,000 sq. ft. vegetation	Minor	\$1,000-\$2,000
Clearing of Invasive or noxious vegetation	Very Minor	Up to \$1,000*

Note: The clearing of threatened, endangered or commercially valuable plants will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant. According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/sq.ft., so clearing 10,000 sq.ft. Staff could assess a penalty of \$10,000.

2.1.5 Additional Considerations and Factors

After Staff applies the Conservation District violation graduated penalty framework to identify the violation penalty range (1, 2, and 3 found above), the Staff may incorporate several considerations into the final assessed conservation district penalty including but not limited to, those factors identified in HAR §13-1-70 Administrative Sanctions Schedule; Factors to be Considered.

2.1.6 Continuing Violations and Permit Non-Compliance

Each day during which a party continues to work or otherwise continues to violate conservation district laws, and after the Department has informed the violator of the offense by verbal or written notification, the party may be penalized up to \$15,000 per day (penalties for every day illegal actions continue) by the Department for each separate offense.

* Provided the harm to the resource and visible damage were minimal.

Violation of existing approved Conservation District Use Permit (CDUP) conditions will be assessed on a case-by-case basis. Existing permit violations, in which deadlines are not met, may be individually assessed by the Staff as to prior violator conduct, knowledge, and compliance. Violation of permit conditions involving initiation and/or completion of project construction, notification of start and completion dates, failure to file legal documents, etc., may be considered very minor within the existing framework, although it should be noted that such actions may result in permit revocation. Failure to perform proper cultural, archeological, or environmental impact studies or failure to implement proper best management practices as identified in the standard permit conditions may be assessed more severely by Staff, as a moderate or major harm to the resource, due to the potential of greater adverse impacts to natural resources from the violator's failure to comply with the permit conditions, may have occurred.

2.1.7 In-Kind Penalties

Once the penalty amount has been established through the framework above, the Department may determine that the full payment or some portion of the penalty may be paid as an in-kind penalty project.⁹ This would not serve as a way to avoid payment but as a way to reduce the cash amount owed while allowing the Department to consistently enforce its rules. The in-kind penalty project is not designed to credit the violator for restoration or remediation efforts that may be already required, but to offset a portion of the cash penalty assessed. The in-kind penalty should be enough to ensure future compliance with HAR §13-5 and HRS §183C, by the violator and to deter other potential violators from non-compliance.

In-kind penalties will only be considered if (1) the responsible party is a government entity, such as a federal agency, state agency, county agency, city agency, university, or school board, or if (2) the responsible party is a private party proposing an environmental

⁹ In-Kind Penalty framework has been adapted from Florida Department of Environmental Protection, 2007, Program Directive 921, Settlement guidelines for civil and administrative penalties.

restoration, enhancement, information, or education project. In-kind penalties are limited to the following specific options:

- a. **Material and/or labor support for environmental enhancement or restoration projects.** The Department will give preference to in-kind projects benefiting proposed government-sponsored environmental projects. For shoreline violations, this may include state beach nourishment projects and dune restoration projects.
- b. **Environmental Information and Environmental Education projects.** Any information or education project proposed must demonstrate how the information or education project will directly enhance the Department's, and preferably the OCEC's, mission to protect and conserve Hawaii's Conservation District Lands.
- c. **Capital or Facility Improvements.** Any capital or facility improvement project proposed must demonstrate how the improvement will directly enhance the Department's and/or public's use, access, or ecological value of the conservation property.
- d. **Property.** A responsible party may propose to donate land to the department as an in-kind penalty. Donations will be handled by the Department's Legacy Lands program or similar program.

3 ASSESSMENT OF DAMAGES TO PUBLIC LAND OR NATURAL RESOURCES

Penalties to recoup damages to public lands or natural resources for the purposes of enforcement and remediation may be assessed in addition to Conservation District violation penalties assessed by the aforementioned guidelines. The assessed total value of the initial and interim natural resource(s) damaged or lost (compensatory damages) and the cost of restoration or replacement of the damaged natural resource(s) (primary restoration cost) along with any other appropriate factors, including those named in HAR §13-1-70, may be adjudicated by the Board. The total value may be estimated on a per annum basis, and then may be used to calculate the net present value of the initial and interim loss of natural resource benefits, until the ecosystem structure, function, and/or services are restored.

The cost of a full-scale damage assessment by the Department would be an administrative cost, which could be recouped by the Board from the landowner or offender pursuant §HRS 183C-7. In some cases, the damage to public lands or natural resources may occur on more than one ecosystem or habitat type, (e.g., sandy beaches, seagrass beds, and coral reefs). In such instances, damages for all impacted systems will be handled cumulatively.

Since all the ecosystem services provided by the ecosystem in question cannot be quantified (e.g., the aesthetic value), the values obtained are lower bound estimates, and may be applied to systems similar to the referenced ecosystem using the benefit transfer method. These valuations, to account for the loss of ecosystem services and the cost to restore them, may be applied to Hawaiian ecosystems on public lands: such as Koa and Ohia forests, coral reefs, seagrass beds, wetlands, dune and beach ecosystems, and other important Hawaiian ecosystems.

While each case is unique and individual in nature, the Department may not be able to conduct detailed damage assessments in each case, and may refer to past precedent,

2.1.8 Penalty Adjudication

Violation penalties may be adjudicated similarly to the harm to resource indices in the penalty guideline framework.

Comparable Harm to Resource	Identified Harm and Penalty Range	Penalty Adjudicator
Major	\$10,000-\$15,000	Board
Moderate	\$2,000-\$10,000	Board
Minor	\$1,000-\$2,000	Chairperson or Presiding Officer
Very Minor	up to \$1,000	Chairperson or Presiding Officer

Major and Moderate Harm to the Resource

The Board may adjudicate penalties to violations categorized as causing or potentially causing major or moderate harm(s) to the resource. The Board may also adjudicate cases in which repeat violations, repeat violations, or egregious behavior were involved, or moderate to significant actual harm to the resource occurred. The Board may also adjudicate the payment of part or all, of the penalty as part of an in-kind penalty.

Minor and Very Minor Harm to the Resource

The Board may delegate to the Chairperson or a Presiding Officer the power to render a final decision in minor and very minor conservation district violations in order to provide expeditious processing and cost effective resolution. The Chairperson or appointed Presiding Officer may adjudicate penalties to minor and very minor violations characterized by inadvertent or unintentional violations and those violations which caused minor or very minor harm to the resource.

economic ecosystem valuations, and other published environmental valuations to estimate and assess damages on smaller scales (for valuations and publication examples see Appendix C: References and Appendix D: Damages Examples). Using the benefit transfer method to apply past precedents and published valuations in some situations would allow the Department to focus its administrative duties and time on remediation and restoration efforts. However, as ecological valuation and research continue, more comprehensive estimates may be produced and utilized.

The Board may allow restoration activities and damage penalties to be conducted and/or applied to a site different from the location of the damaged area where similar physical, biological and /or cultural functions exist. These assessed damages are independent of other, city, county, state and federal regulatory decisions and adjudications. Thus, the monetary remedies provided in HRS §183C-7 are cumulative and in addition to any other remedies allowed by law.

3.1 PRIMARY RESTORATION DAMAGES

The cost of land or habitat restoration or replacement, the cost of site monitoring, and site management may be assessed and charged as primary restoration damages. Restoration efforts will aim to return the damaged ecosystem to a similar ecological structure and function that existed prior to the violation. In cases in which the damaged ecosystem was predominately composed of non-native species, restoration efforts must re-vegetate Conservation District land and public lands with non-invasive species, preferably native and endemic species when possible. The use of native and endemic species may thus result in the restoration of ecological structure and function critical for the survival of endemic Hawaiian species.

Returning the damaged and or severely degraded site to a condition similar to or better than its previous ecological structure and function (e.g., a terrestrial system such as a Koa (*Acacia koa*) forest) would include: (1) calculating the level of ecosystem services to be restored from carbon sequestration, climate regulation, nutrient cycling, air and water purification, erosion control, plant and/or wildlife habitat, and any other services which

may be valued; (2) purchase, production and out-planting of Koa seedlings; and (3) monitoring, maintenance, and management for the time period of mature growth of ~40-60 years, to achieve mature canopy structure, native under-story, and an acceptable level of lost ecosystem structure, function and/or services restored.

3.2 COMPENSATORY DAMAGE CALCULATION

Compensatory damages to public lands or natural resources may be assessed and charged to the violator to compensate for ecosystem damage and lost initial and interim ecosystem services to the public. All Divisions of the Department may coordinate their resources and efforts along with existing ecosystem valuations and publications (See Appendix C and D for examples) to derive the estimated total value of the natural resource damaged until the ecosystem structure, function, and services are estimated to be recovered.

The total value of the natural resource that is lost or damaged may include the initial and interim values of the ecosystem services provided by the natural resource or habitat, and the social-economic value of the degraded site, until the ecosystem structure, function, and/or services are restored. Assessing the damages to the resource could include: estimating the loss of ecosystem services of carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism, fisheries, society, cultural inspiration and practices, and any other services which may be valued.

These natural resource damages may be assessed using economic valuation techniques to estimate the total value(s) of the natural resource(s) damaged on a per area basis, including: total ecosystem services value, total annual benefits, the market value of the natural resource, or any other factor deemed appropriate. The total value of the present and interim natural resource damage may be estimated by calculating the net present value of these lost benefits, values and services. The net present value may be calculated using a discount rate to scale the present and future costs to the public, of the interim losses of ecosystem services over the restoration time. The restoration time may be

estimated as the number of years for the damaged natural resource or ecosystem to reach maturity and/or the ecosystem structure and function to be restored similar to the pre-violation state. The discount of future losses and accrued benefits may be used in the valuation of mitigation efforts performed by the violator. For example the restoration conducted immediately after damage occurred may be calculated to have a higher present benefit worth than the benefit of restoration activities undertaken a year or two later.

In other instances, a habitat equivalency analysis (HEA) or a resource equivalency analysis (REA) may be used to scale equivalent habitat or wildlife losses for estimating both ecosystem damage penalties and restoration efforts.

3.3 ADJUDICATION OF DAMAGES

The adjudication of primary restoration damages and compensatory damages will be adjudicated by the Board due to the complexity of the assessment process and to assure proper checks and balances, including adequate public notice and a public hearing.

In addition to the damages and penalty violations assessed, the Department is allowed to recoup all administrative costs associated with the alleged violation pursuant to HRS §183C-7(b). All penalties assessed will be in compliance with HRS §183C-7(c) and will not prohibit any person from exercising native Hawaiian gathering rights or traditional cultural practices.

APPENDIX A: GUIDELINE FRAMEWORK TABLES

Table 1. Penalty Guideline Framework

Harm to resource or potential for harm to resource	Identified land use permit activities with the letter	Penalty Ranges
Major	D (Board)	\$10,000-\$15,000
Moderate	C (Departmental)	\$2,000-\$10,000
Minor	B (Site Plan)	\$1,000-\$2,000
Very Minor	(B) (Site Plan)	Up to \$1,000

Table 2. Vegetation Removal

Action	Classifiable Harm to Resource	Penalty Ranges
Removal of more than 10,000 sq. ft.	Major	\$10,000-\$15,000
Removal of Vegetation or of 2,000-10,000 sq. ft. of vegetation	Moderate	\$2,000-\$10,000
Removal of less than 2,000 sq. ft. vegetation	Minor	\$1,000-\$2,000
Clearing of invasive or noxious vegetation	Very Minor	Up to \$1,000 ^a

Note: According to Table 2, the clearing of vegetation may incur a penalty of up to \$1/sq. ft., as clearing 10,000 sq. ft. itself could incur a penalty of \$10,000. The clearing of threatened, endangered or commercially valuable plants, will be addressed on a case-by-case basis, but depending on the importance of the species may incur a penalty of up to \$15,000 per plant.

APPENDIX B: DEFINITIONS

Definitions:

- (1) "Baseline" means the original level of services provided by the damaged resource.
- (2) "Benefit Transfer Method" estimates economic values by transferring existing benefit estimates from studies already completed for another location or issue.⁷
- (3) "Board" means the Board of Land and Natural Resources.
- (4) "Board Permit" means a permit approved by the Board of Land and Natural Resources.
- (5) "Chairperson" means the chairperson of the board of land and natural resources
- (6) "Civil Resource Violations System" or "CRVS" means a system of administrative law proceedings as authorized under chapter 199D, HRS, and further prescribed in Subchapter 7, 13-1, HAR, for the purpose of processing civil resource violations.
- (7) "Compensatory Damages" means damages for compensation for the interim loss of ecosystem services to the public prior to full recovery.
- (8) "Contested Case" means a proceeding in which the legal rights, duties, or privileges of specific parties are required by law to be determined after an opportunity for an agency hearing.
- (9) "Department" means the Department of Land and Natural Resources.
- (10) "Departmental Permit" means a permit approved by the Chairperson.
- (11) "Discounting" means an economic procedure that weights past and future benefits or costs such that they are comparable with present benefits and costs.
- (12) "Ecosystem Services" means natural resources and ecosystem processes, which may be valued according to their benefits to humankind.

For example: carbon sequestration, climate regulation, nutrient cycling, plant and/or wildlife habitat, biodiversity, air and water purification, erosion control, coastal protection, the loss of benefits to tourism,

⁷ Ecosystem Valuations http://www.ecosystemvaluation.org/benefit_transfer.htm

recreation, scientific discovery, fisheries, society, cultural inspiration and practices, and any other services which may be valued.

- (13) "Grossly negligent" violation means conscious and voluntary acts or omissions characterized by the failure to perform a manifest duty in reckless disregard of the consequences.^{*}

(14) "Harm to resource" means an actual or potential impact, whether direct or indirect, short or long term, acting on a natural, cultural or social resource, which is expected to occur as a result of unauthorized acts of construction, shoreline alteration, or landscape alteration as is defined as follows:

- (a) "Major Harm to resource" means a significant adverse impact(s), which can cause substantial adverse impact to existing natural resources within the surrounding area, community or region, or damage the existing physical and environmental aspects of the land, such as natural beauty and open space characteristics
- (b) "Moderate Harm to Resource" means an adverse impact(s), which can degrade water resources, degrade native ecosystems and habitats, and/or reduce the structure or function of a terrestrial, littoral or marine system (but not to the extent of those previously defined as those in (a)).
- (c) "Minor Harm to Resource" means limited to short-term direct impacts from small scaled construction or shoreline or vegetation alteration activities.
- (d) "Very Minor Harm to Resource" means an action in which the impact on the water resource or terrestrial, littoral or marine ecosystem was insignificant, and was not of a substantial nature either individually or cumulatively.

For example, "major harm to the resource(s)" would be associated with a major land use violation that would have likely required a Board Permit, such as building a house, while a "minor harm to the resource(s)" may be

^{*} Definition adapted from Florida Department of Environmental Protection, 2000 Administrative Plan and Damages Liability, Ch. 62B-54.

associated with minor land uses requiring an administrative Site Plan Approval, for building a small accessory structure.

- (15) "Knowing" violation means an act or omission done with awareness of the nature of the conduct.
- (16) "Net Present Value" means the total present value (PV) of a time series of cash flows.
- (17) "OCCL Administrator" means the Administrator of the Office of Conservation and Coastal Lands.
- (18) "Party" means each person or agency named or admitted as a party.
- (19) "Person" means an appropriate individuals, partnership, corporation, association, or public or private organization of any character other than agencies.
- (20) "Presiding Officer" means the person conducting the hearing, which shall be the chairperson, or the chairperson's designated representative.
- (21) "Primary Restoration Damages" means the costs to restore the damaged site to its prior baseline state.
- (22) "Site Plan" means a plan drawn to scale, showing the actual dimensions and shape of the property, the size and locations on the property of existing and proposed structures and open areas including vegetation and landscaping.
- (23) "Willful violation" means an act or omission which is voluntary, intentional and with the specific intent to do something the law forbids, or fail to do something the law requires to be done.

APPENDIX C: REFERENCES

- Coser, H., van Beukering, P., Pinz, S., Dierking J. 2002. Economic valuation of the coral reefs of Hawaii. NOAA Final Report NA 160A1449.
- Conservation International. 2008. Economic Values of Coral Reefs, Mangroves, and Seagrasses: A global Compilation. Center for Applied Biodiversity Science, Conservation International, Arlington VA, USA.
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- Florida Department of Environmental Protection. Damage Costs in Seagrass Habitats. http://www.dep.state.fl.us/coastal/habitats/seagrass/awareness/damage_costs.htm
- Florida Department of Environmental Protection. 2000. Administrative Fines and Damage Liability. Ch. 62B-54. <http://www.dep.state.fl.us/legal/Rules/beach/62b-54.doc>
- Florida Department of Environmental Protection. 2007. Program Directive 923, Settlement guidelines for civil and administrative penalties. www.dep.state.fl.us/admin/depdirs/pdf/923.pdf
- Florida Department of Environmental Protection. 2000. Rules and procedures for application for coastal construction permits. Ch. 62B-41. <http://www.dep.state.fl.us/beaches/publications/pdf/62b-41.pdf>

APPENDIX D: DAMAGES EXAMPLES

Examples of Damage Assessments and Possible Remediation Efforts

The following are only brief past estimates used in Hawaii and other states; they are by no means comprehensive or limiting. These are intended to be examples for possible assessments and remediation efforts not as templates. As previously stated each case will be handled individually to account for unique ecological, economic and cultural impacts. The following are organized by habitat type.

Coral

Florida Department of Environmental Protection (Civil Damages):

The DEP can impose fines of up to \$1,000/m² of reef damaged and is dependent on the absence of extenuating circumstances such as weather conditions, disregard of safe boating practices, navigational error, whether the vessel operator was under the influence of drugs or alcohol etc.

Cesar et al 2002 (Ecosystem Service Valuation)

Cesar et al. used a Simple Coral Reef Ecological Economic Model (SCREEM) to assess Hawaiian coral reefs based on the annual benefits of the coral reefs to recreation/tourism, property amenities, biodiversity, fisheries and education. The annual benefits and total economic value could then be expressed on a 'per area' basis. This study found the total annual benefits of the coral reefs of Hanauma Bay to be \$37.57 million (\$2,568/m²), of the coral reefs in Kihui to be \$28.09 million (\$65/m²) and the coral reefs on the Kona coast to be \$17.68 million (\$19/m²).

Pilea enforcement (KA-02-10) (Primary Restoration Cost)

Damage to Coral reef ecosystems was assessed for restoration activities according to Florida guidelines, as \$5,830,000 for 5,380 m² of coral reef damage. This calculation

was similar to the estimated cost of remediation efforts \$390,000 to clean 5,000 yd³ of beach sand. However between 30,000-50,000 yd³ was estimated to be impacted, totaling \$2,300,000-\$3,900,000. While cleaning the sediment from the reef was estimated to cost approximately \$845,000 (for the 13 acres, or \$65,000 for 10m²). This totaled between \$3,100,000 and \$4,700,000, and did not include coral colony re-establishment. An additional \$630,000 was estimated for the 10-year monitoring period, (however studies by Cesar et al. 2003 estimated a 25 year period for recovery of ecological impacts).

This damage to corals may be calculated as follows:

Number of square meters of coral damaged
X Multiplied by \$1,000 (or estimated value of coral on per/area basis)
(#m2 x \$1000)

Plus the estimated net present value of ecosystem services lost until recovery. (This may be more if damage to an area such as Hanalei Bay with increased recreational economic revenue.)

+Plus cost of Remediation
+Plus Cost of cleaning sediment from reef
+Plus Cost of cleaning sediment/mud from beach sand
+Plus Cost of coral reestablishment
+Plus Cost of Monitoring
+Plus Cost of Management

Seagrass beds (Compensatory Damage)

The Florida DEP fines offenders \$100/yd² of damage to seagrass beds for the first yd² damaged and \$75/yd² per each additional yd² damaged.

\$100 for the first yard damaged
+\$75 per each additional yard
or net present total value of ecosystem services lost until recovery
+vegetation planting
+monitoring

Sand Beaches (ex. Of Primary Restoration Costs)

Minimum penalty cost of restoration and potential negative ecological, social and environmental impacts should be included in the assessment of damaged, degraded or lost sandy beaches. As one of Hawaii's greatest natural resources the following should be included in the minimum penalty assessment, however, as ecological valuation and research continue, more comprehensive estimates may be produced. In KA-02-10 Pila, \$390,000 fine was estimated to clean 5,000 yd³ of beach.

+Cost of lost revenue due to altered Beach resources (compensatory)
+primary restoration costs
+Plus cost of cleaning of sediment/mud from beach area (if necessary)
+Plus cost of beach nourishment (sand replacement)
+Plus cost of native dune vegetation

(In some circumstances the loss of beach resources may be assessed in conjunction with other ecological impacts listed above, such as coral reefs and sea grass beds.)

APPENDIX E: PENALTY CALCULATION WORKSHEET

Violator's Name(s): _____
 TMK: _____
 OCCL Staff Member: _____
 Date: _____

Part 1- Penalties

Violation Type	Penalty Prefix (D,C,B)	Harm to Resource (actual & potential)	Tree or Vegetation Status	Penalty Range	Adjustments (Mark Adj. Choices #1-4)	Multi-day (# days)	Total
1							
2							
3							
4							
5							
6							
7							
8							
9							
10							

Penalty Total:

Penalty Adjustments and Descriptions (please attach additional adjustments and descriptions, including but not limited to those listed in §13-1-70)

- Actual environmental damage extent (onsite)
 Description: _____
- Actual environmental damage extent (offsite)
 Description: _____

- Does the violator's have a history of violations?

 - Was the violation repetitions or of a long duration?

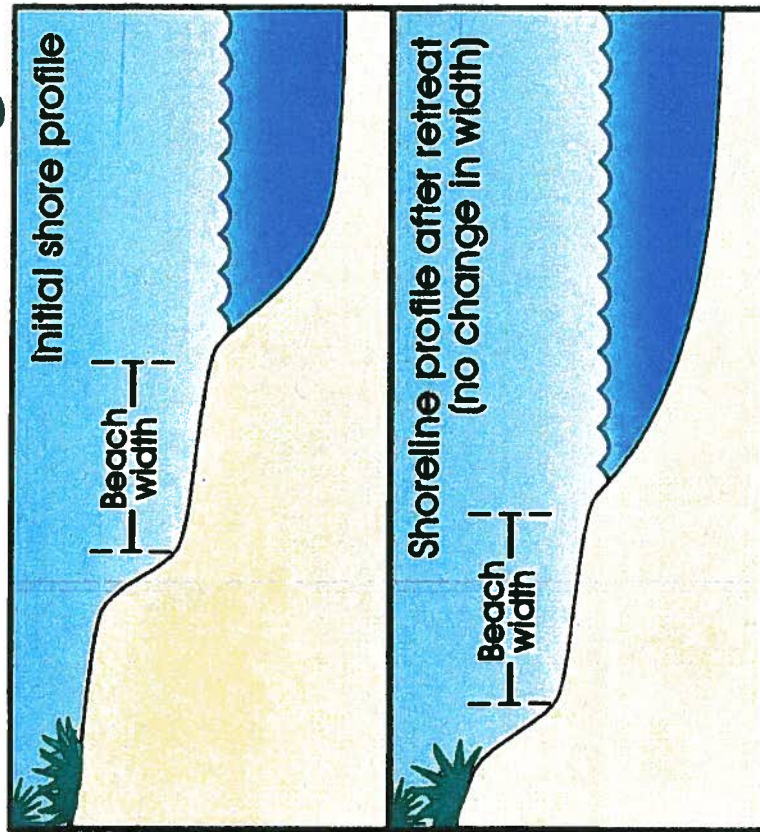
 - Was the violator Responsive and exhibit a level of cooperation of with the Department and/or Staff?

 - Does the Violator have a Financial Hardship?

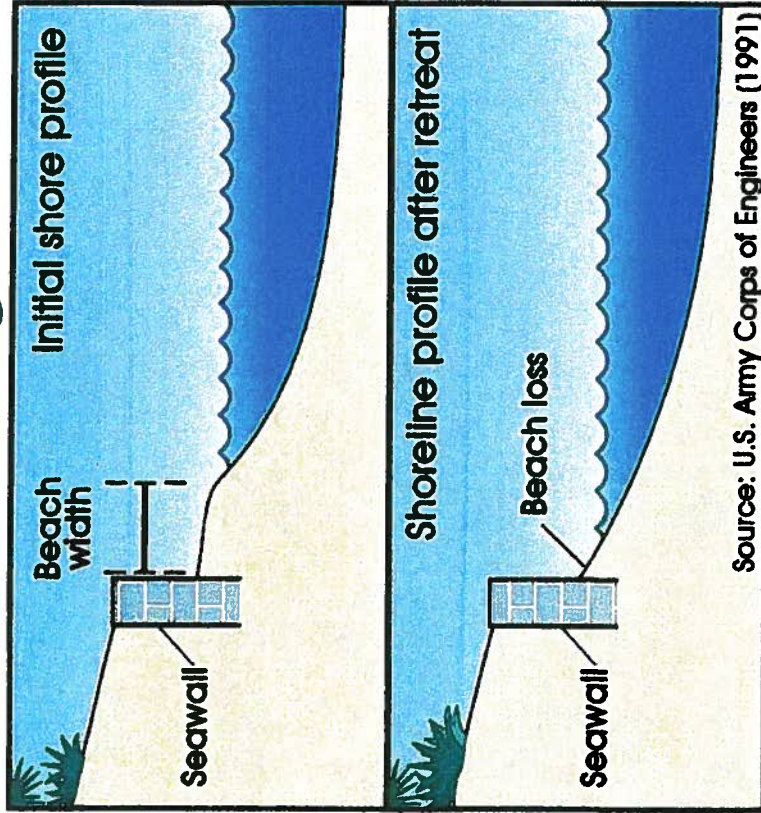
 - Did the violator receive Economic or commercial gain through non-compliance?

 - Other.
 Description: _____
- Total Adjustment: up/down _____
- Multi-day penalties
 Number of days to multiply penalty: _____
 Reasoning: _____
- Total multi-day: _____

Beach Loss Fronting Coastal Armoring



Beaches on chronically eroding shores can maintain their natural width as they slowly retreat landward.



Source: U.S. Army Corps of Engineers (1991)

Beach loss eventually occurs in front of a seawall where there is chronic erosion.

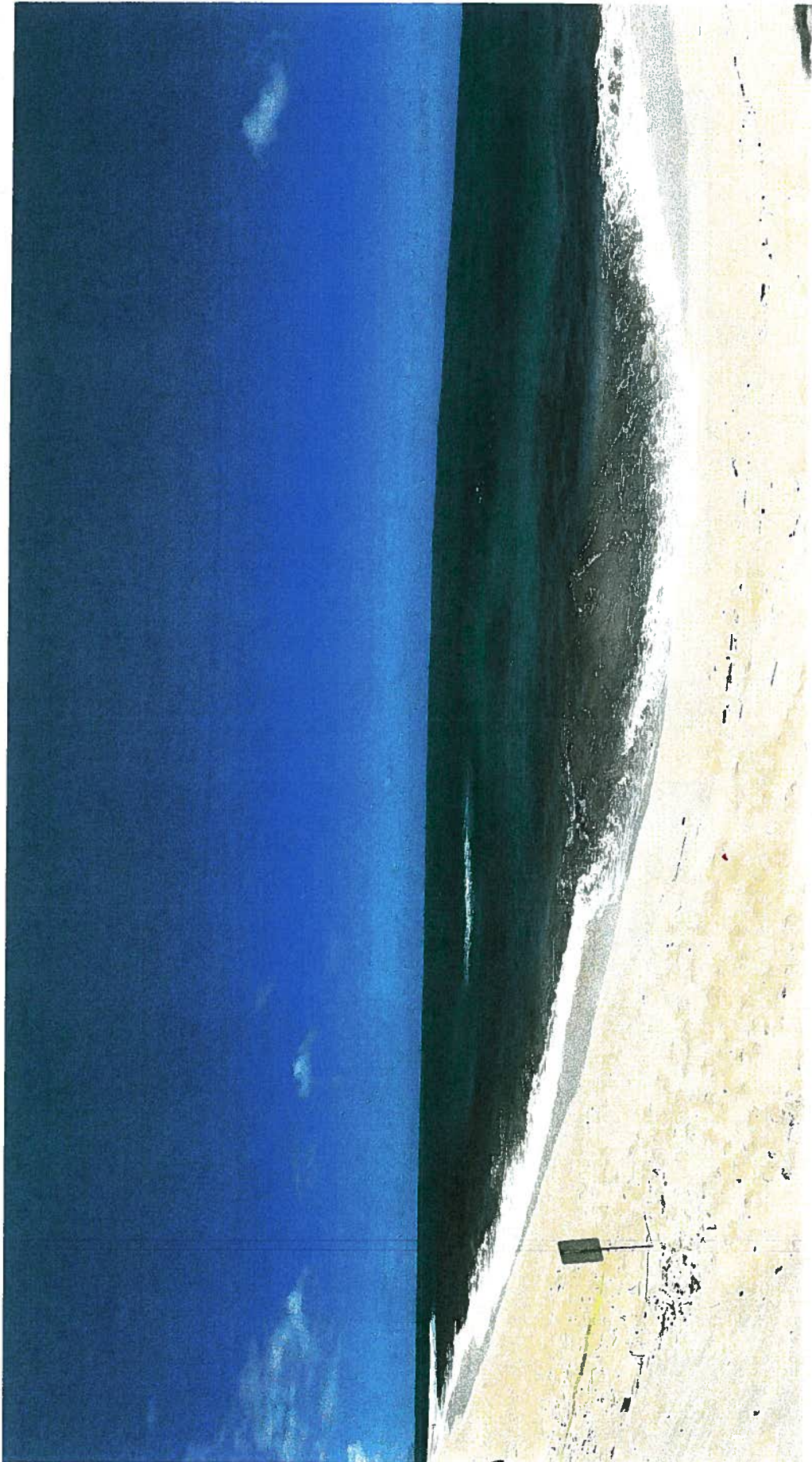


EXHIBIT 18

STATE OF HAWAII
DEPARTMENT OF LAND AND NATURAL RESOURCES
Land Division, Planning Branch
Honolulu, Hawaii

August 27, 1999

Board of Land and
Natural Resources
State of Hawaii
Honolulu, Hawaii

REGARDING: Adoption of Revisions to the Coastal Erosion
Management Plan (COEMAP), Approval of April 8,
1999 Minutes, Approval of 1999-2000 Work Plan
and Approval of Procedures for Managing
Shoreline Encroachments

APPLICANT: Department of Land and Natural Resources
Land Division
1151 Punchbowl Street, # 220
Honolulu, Hawaii 96815

BACKGROUND: (COEMAP was adopted by the Board on November
20, 1997. A Board Briefing on the revisions
was held on April 8, 1999)

The loss of Hawaii's sandy beaches is a major social, economic, and
environmental problem. Studies show that nearly 25 percent, or 17
miles of sandy beaches on the island of Oahu have been lost or
severely narrowed over the past 70 years due to shoreline armoring.
Similar losses have occurred on the island of Maui, and to a lesser
degree, on Kauai and Hawaii.

In January of 1996, DLNR, Land Division initiated development of a
strategic plan to address coastal erosion within a framework of
beach protection, something that had never been attempted before in
this State. These efforts resulted in the development of the
Hawaii Coastal Erosion Management Plan (COEMAP).

On November 20, 1997 COEMAP was approved, as submitted, by the
Board of Land and Natural Resources (Board) (Exhibit 1). In

APPROVED BY THE BOARD OF
LAND AND NATURAL RESOURCES
MEETING HELD ON

August 27, 1999 EXHIBIT 19

ITEM D-25

approving COEMAP the Board also established the Coastal Lands Program (CLP) and affirmed an annual work plan.

Subsequent to the land Board's approval, Land Division staff, in consultation with the University of Hawaii, School of Ocean, Earth Science and Technology (SOEST) decided that certain aspects of COEMAP could be improved and better organized. As such, another round of plan revisions was initiated by SOEST. Draft reports were revised by Land Division staff and then distributed to members of the Coastal Erosion Subcommittee (CES) of the Marine and Coastal Zone Management Group (MACZMAG). Comments were incorporated into the plan. A major goal of the plan revision process was to ensure that the revisions were consistent with the original intent and content of COEMAP.

Since the inception of this effort, the Department has adhered to three simple goals/objectives: 1) generate agency consensus on the problems and implications associated with the narrowing and loss of sandy beaches; 2) develop working agreements with agencies and/or groups to solve coastal erosion problems by reducing duplication and government red tape; and 3) build agency-wide/public support for the legislative changes needed to implement different aspects of the plan.

All three (3) of these goals/objectives have been achieved to a considerable degree. For example, a major goal was to pass new legislation, which the Department accomplished in 1999 with the adoption of Act 84. In addition, the Department is developing an agreement with the U.S. Army Corps of Engineers, the Department of Health, and the Coastal Zone Management Program, to establish a State Program General Permit (SPGP) for qualifying types of beach nourishment projects. The Department also completed a plan to develop pilot beach nourishment projects on Oahu and Maui, and is currently planning on funding a design phase for one of the sites. These accomplishments represent milestones rather than end points.

In addition, a work plan was proposed for 1997-1998 which included the following initiatives: 1) public education and outreach and agency consultation; 2) the development of procedures to address enforcement of illegal shoreline structures; 3) development of pilot projects and compilation of new data; 4) establishment of an offshore sand reclamation program; 5) development of economic analysis, or benefit/cost analysis of different coastal protection technologies; 6) continuation of the Coastal Erosion Subcommittee (CES); 7) the development of Memorandums of Understanding (MOU); and 8) finding funds.

Many of the 1997-'98 work plan elements are currently being addressed. For instance, with the adoption of Act 84, Land Division staff has proposed new protocol to address existing

shoreline encroachments, since Act 84 allows the DLNR to place fines collected for unauthorized shoreline structures, and proceeds collected from the issuance of easements for existing shoreline structures, in the Beach Restoration Fund.

The Land Division has not yet established an offshore sand reclamation program but is now considering the possibility of issuing an RFP to develop an offshore site as a pilot project. This is now a possibility with the adoption of Act 84. Staff will also investigate the potential development of upland sand sources.

Other aspects of the work plan are still underway such as permit streamlining efforts (via the establishment of a State Program General Permit (SPGP) for small scale beach nourishment projects), the continuation of pilot beach restoration projects at Honokawai, Maui and Windward Oahu, and consideration of additional data needs and requirements.

PLAN REVISIONS:

The Board adopted COEMAP in November 1997. COEMAP was a multifaceted strategic plan intended to address coastal erosion within a framework of beach protection. While the plan revisions have not changed in this essential quality, they have resulted in a planning document that is better organized and easier to read. The Plan also provides more technical information to support the recommendations embodied in the Plan. The new Plan is 59 pages long, not including appendix (Exhibit 2). The original Plan was 21 pages.

SPECIFIC PLAN REVISIONS:

Organizationally, the revised Plan is comprised of four sections including an "Executive Summary", three chapters and an appendix. The "Executive Summary" includes a brief discussion of the problem and consequences of beach loss and includes a list of "Goals and Directions as well as a summary of "Recommendations" embodied in COEMAP. The first chapter titled "Our Restless Shores" quantifies beach loss and then describes why beach loss occurs in Hawaii and what consequences society possibly faces due to this environmental problem. The Executive Summary and Chapter I, Our Restless Shores, essentially replaces, improves and augments Sections I, II & III, of the original COEMAP document. Some of the specific revisions are as follows:

Executive Summary:

- More thorough discussion of social, economic, cultural and environmental consequences of beach loss and coastal erosion.

- Clarification on purpose of COEMAP (i.e., COEMAP as a framework, source of information or guidance on coastal erosion management, rather than COEMAP as a new paradigm or rule of law).
- Seven new goals and directions are listed.
- The plan recommendations and initial implementing actions are also summarized.

Chapter I, Our Restless Shores:

Chapter one generally provides a more comprehensive overview of coastal erosion and beach loss in terms of its multifaceted effects on Hawaii's different individuals, groups and entities, and how we can improve cooperation at all levels and sectors of society to address erosion problems more effectively through "'Ho'olaulima" (many hands working together). There is a more comprehensive overview of the underlying causes (both natural or human induced) of coastal erosion and beach loss, which is augmented with an expanded Technical Supplement. Our Restless Shores also recommends that we look at coastal erosion within the much more integrated framework of coastal hazards mitigation. Some of the more specific revisions are as follows:

- More in depth discussion of why coastal erosion and beach loss occur in the first place.
- Integration of coastal erosion management with management efforts in similar sectors such as Hurricanes, tsunamis and flooding, to show that regulatory authorities may pursue the compatible goals of beach conservation and hazard reduction using an integrated framework.
- Ho'olaulima (many hand working together) promoting an educational, consensual and community based process to improve our coastal environment.

Chapter II, Managing Coastal Erosion:

This Chapter provides an overview of Federal, State and County Authorities with regulatory oversight in the area of coastal erosion management. A critique of the existing regulatory/management regime is provided. This is a new section that was not included in the original Plan. It includes new information, but generally expands on issues and ideas contained in the original Plan. Some of the revisions and additions are as follows:

Discussion of current coastal erosion regulatory regimes at the State, County and Federal levels.

Critique of the existing regulatory regimes (e.g., lack of attention to problem, under valuation of resources, failure of coastal zone management system to address coastal erosion and beach loss, etc.)

Discussion of new tools for erosion management including new regulatory tools, such as:

Environmental Sequencing to reduce exposure to coastal erosion hazards utilizing such concepts as Avoidance, Minimization and Compensatory Mitigation.

Construction Setbacks, to reduce exposure to coastal hazards. This section significantly expands over the discussion in the original plan, by using examples from other states, where variable based setbacks have been implemented.

The plan discusses non-regulatory tools, including the utilization of Federal Floodplain Policies to reduce exposure to coastal erosion hazards. Some other ideas are as follows:

Community Performance Standards to help address future patterns of development in already developed coastal communities.

Coastal Lands Acquisition, including the use of Eminent Domain, Negotiated Purchase, Conservation Easements, and others, also citing existing programs from other coastal States.

Public Education and Outreach

Chapter II also provides a discussion of five (5) Alternatives for Erosion Management including Abandonment (do nothing), Beach Restoration (fill the beach with sand), Erosion Control (slow down the erosion rate), Adaptation (live with it), and Hardening build walls). Chapter II discusses various Design Considerations when planning/engineering any erosion control project, and ends with a discussion of the need to do physical monitoring when projects are implemented to assess performance and environmental effects.

Chapter III, Recommendations:

This is essentially a consolidation of Sections V-X of the original Plan. The Strategic Recommendations are reorganized and improved and included in one section, unlike the original Plan that included Technical vs. Policy Recommendations, Long Term Policy and Technical vs. Short term Plans.

Chapter III also includes a new section on Initial implementing Actions, which are generally similar to Strategic Recommendations recommended in the original Plan.

Technical Supplement:

The Revised Plan also includes a Technical Supplement with Parts A-D. Part A lists and summarizes most of the studies done in the area of Coastal Erosion or Beach Management for Hawaii. Part B includes a copy of a Brochure on Facts about Beach Erosion and the new Coastal Lands Program at DLNR. Part C provides a more detailed discussion surrounding the causes of coastal erosion and beach loss in Hawaii, and Part D includes Guidelines for Preparation of an Environmental Assessment in Conjunction with an Application for a Shoreline Alteration and Hardening Permit.

Throughout, the plan is also extensively footnoted and referenced to draw in a much wider framework of research and planning.

AGENCY/PUBLIC INPUT:

April 8, 1999 Board Briefing:

On April 8, 1999, the Land Board was presented with a briefing of the revised Coastal Erosion Management plan. The purpose of the briefing was to familiarize the Board with revisions to COEMAP.

DLNR staff presented the revised version of COEMAP and discussed the various plan elements including a discussion of regulatory and non-regulatory tools, coastal erosion management alternatives, design considerations, and specific recommendations, etc. Staff highlighted the changes in COEMAP and noted that the revisions to COEMAP provide for a more detailed, comprehensive, and integrated plan.

The Chairperson of the Board of Land and Natural Resources asked staff to highlight the revisions in COEMAP from the original document, so that the Board would know whether the changes are in keeping with the original intent and objectives of COEMAP. There was discussion over the breadth of public involvement developing COEMAP and whether enough had been done on this and earlier drafts.

Staff referred to past outreach efforts on the island of Oahu, which were fairly comprehensive, and also discussed the intense agency consultation even on the most recent draft. It was noted that the Maui County Council endorsed the original Plan as well as the City and County of Honolulu, Department of Planning and Permitting.

Comments were also solicited from the Counties of Hawaii and Kauai on the revised Plan. Hawaii County Planning had numerous comments and concerns which staff incorporated into the Plan.

Another Board member raised concerns that the effect of the plan, if adopted, would be to raise expectations on the affected agency stakeholders, but without the force of law and/or more specific guidance on how to achieve the plan's objectives. This could lead to some confusion and uncertainty with respect to how to actually manage and regulate these areas.

Staff responded by stating that the original intent of the plan was never to recommend specific changes to any County regulations, but was provided to the public and regulatory communities as a document that could be used to raise awareness of the causes and consequences of coastal erosion and beach loss and also provide technically and politically feasible recommendations for those desiring to implement them. Staff further noted that it was a deliberate decision to approach the problem of coastal erosion from the perspective of education.

Another concern was whether the revised plan would need to be taken back to the public for review. Staff followed by noting that this was not necessarily required since the original intent and purpose of the plan had not changed.

Written Comments Submitted at the Briefing:

Mr. Dudley Foster of Lanikai and Mr. George Peabody of Molokai submitted comments. Mr. Peabody submitted strong objections to our inclusion of Part D of the Technical Supplement noting that thirteen (13) guidelines for environmental assessment prepared in conjunction with an application for shoreline alternation or hardening would be prohibitive and a punitive burden on taxpayers.

The Hawaii County Planning Department was also concerned over the inclusion of these guidelines in COEMAP. They were concerned over the seawall policy, which we removed.

Actually, the revision included two elements: 1) shoreline hardening policies; and 2) the 13 guidelines. Staff elected to

remove the shoreline hardening policies but retain the guidelines for the preparation of environmental assessments.

In comments to the County, we noted that there are significant impacts associated with shoreline hardening that have not always been disclosed and analyzed in environmental reviews. As such, Staff feels that there must be more discussion of the various impacts associated with shoreline hardening. To accomplish this, environmental documents must be completed with more reconnaissance information and site analysis.

In response to Mr. Peabody's concerns, staff notes that these are guidelines, not rules. They represent a worst-case scenario for any shore protection or alteration project being proposed, where it is believed that shoreline processes or marine resources could be altered or damaged. The purpose of the assessment is to assess the effects of shore alteration projects on coastal resources to ensure that there is a reasonable balance between shore alteration work and environmental protection. All assessments may not require all 13 guidelines to be covered. The guidelines should not be used to encourage more red tape.

The proposed revisions to COEMAP were brought to the attention of the Lanikai Association and community members. Mr. Foster, for one, notes that the revisions have alleviated many of his concerns except for the following areas.

He is concerned over the term "mauka toe of the primary dune" which is used in COEMAP. The term actually used in COEMAP is "mauka toe of the frontal dune". This term is used to quantify sand volumes in the beach system and is also included in different contexts where other states' setback standards are noted as examples of states with variable setback standards. The term is used to only demonstrate how other states with dynamic shorelines like Hawaii regulate and manage their shorelines.

Staff recognizes the difficulty of imposing new shoreline setbacks based on dune system dynamics within existing developed communities in Hawaii, and as such, proposes alternative schemes for dealing with coastal erosion within these areas, citing concepts like minimizing environmental impacts to beaches on developed shorelines by slowing erosion rates, utilizing beach nourishment, dune restoration, temporary use of seabags and implementation of community performance standards. The concept of "Compensatory Mitigation" is also proposed where damage can't be minimized, and compensation must be made to the State for those damages.

In addition, Mr. Foster is concerned that a number of studies cited in COEMAP contain inaccurate information and he specifically refers to studies of the Lanikai shoreline.

Staff notes that studies are not always accurate and decision-makers must exercise caution when using studies to formulate policies and plans or making decisions on specific cases.

Hawaii County Planning Department:

Hawaii County provided written comments on the revised plan. Although they support the overall concept of COEMAP, they had concerns regarding some of the recommendations, particularly as it deals with possible infringement upon the counties' land use and zoning jurisdictions.

Of significant concern to Hawaii County was our reference to zoning in COEMAP. For instance, Goal no. 1 in the Executive Summary originally stated that the Counties should consider replacing R-5 zoning classification with Beach Management Districts. In response to this concern, the language was changed and all reference to zoning was deleted. Goal No. 1 was replaced with the following language:

Consider Erosional trends and processes, and other coastal hazard at the zoning and subdivision stages of land development so that structures can be safely and properly located away from coastal hazards.

Also, in response to additional concerns that COEMAP, in places, crosses jurisdictional boundaries by commenting on county issues, we deleted or otherwise altered the tone of COEMAP where noted by Hawaii County, and added the following recommendation on page 42, Rec. #3, to maintain the intent of assisting and enhancing the county role in erosion management.

Develop a Technical Manual that provides direction for the development, restoration, and redevelopment of the coastline. The manual would be used on a voluntary basis, but through common usage could become a standard for safe, economical, and sustainable utilization of the coastline.

The County had other comments and concerns on the tone and substance of COEMAP. For instance, Recommendation No. 7 under Strategic Recommendations made references to zoning, 30-year erosion hazard setbacks, building codes, etc. This section was reworded. Coastal Lands Acquisition (recommendation # 9) is now described as non-jurisdictional, that is, the concept is promoted without specific reference to a county or state program. Rezoning

language was deleted and other points were clarified. Reference to "codes" was also been deleted. In addition, it was noted that any new shoreline setback guidelines considered by the counties should be defined by an analysis of historical shoreline fluctuations in an integrated framework with ocean flood hazards. It is staff's understanding that the Hawaii County Planning Department was satisfied with the amendments.

1999-2000 WORK PLAN:

In consideration of the progress in public awareness building, agency coordination, plan development and new legislation, staff proposes the following work elements for 1999-2000:

1. Development of educational materials, including pamphlets, posters and video for public access television (\$10,000). Develop local ownership/capacity building of coastal issues around the Ahupuaa framework, using local community leaders at the erosion hotspots.
2. Hire firm/contractor to investigate upland sand source on public lands on Kauai. Do borings and sand grain analysis, develop plans for extraction and costs of delivery to Oahu and Maui through Port Allen (\$45,000).
3. Seek competitive bids to design a sand recycling system in Waikiki to allow for nourishment of Waikiki Beach and protection of marine resources (\$40,000).
4. Expand COEMAP to include a regional analysis of erosion prone areas using GIS technology. This information would be provided to Counties for consideration of guidelines in COEMAP (\$50,000).
5. Conduct scoping analysis for the development of a Beach Restoration Plan to identify coastal lands suitable for potential revenue generation, to fund beach restoration efforts (\$20,000). For example, Hilton Hawaiian Lagoon, Kaneohe Bay Piers, reclaimed coastal lands, etc.
6. Major sponsor for the National Beach Conference on Beach Preservation to be held on the island of Maui in August 2000 (\$15,000). As a sponsor, DLNR will have input on the content and expected outcomes of the conference so that it closely reflects the needs of the agency.
7. Miscellaneous: Conferences/Travel, etc. \$5,000

Total = \$185,000

OTHER:

1. Complete and implement State Program General Permit (SPGP) for small scale beach nourishment projects. This requires a Board action that authorizes the work statewide.
2. Pursue beach restoration efforts in Waikiki. Meet with hotel association, stakeholders, seek conceptual plans (e.g., sand recycling system).
3. Consider additional laws for 2000 legislature (e.g., revise of repeal accretion statute)

UNAUTHORIZED SHORELINE STRUCTURES/ENFORCEMENT:

Unauthorized shoreline structures, usually seawalls, revetments or groins, have become a persistent dilemma for regulatory agencies in the main Hawaiian Islands. If a shore owner was accused of building an unauthorized coastal erosion structure they could typically deny having built the structure, even though they received substantial benefit from it. The Department is unable to hold the abutting owner responsible without evidence that the owner actually built the structure. In the past, when faced with this situation, the State usually: 1) sold the land in fee; 2) sold shareowner an easement/permit; or 3) asked them to remove the encroachment. This money was deposited into the State General Fund.

The issue of routinely selling easements or fee title to submerged land became a controversial issue when the environmental effects of shoreline hardening on the State's beaches, became recognized as a major social, environmental and economic problem. The problem was no longer perceived a singular issue for land managers to resolve, but a multifaceted dilemma faced by resource managers regarding the appropriate management of the State's shoreline resources. This shifting perspective caused the Land Division to all but stop this practice.

Upon careful consideration of the issues surrounding shoreline hardening and its effects of beaches, Land Division, under the guidance of the Coastal Lands Program staff, would like to resume the practice of issuing easements for existing encroachments. The reasons for this are as follows. There are many cases in which it would be counterproductive and unreasonable to require the summary removal of structures that have been in place for 10, 20, 30 or 40 years, although they may be considered illegal under current laws.

1. There are cases in which such structures have not lead to any direct beach degradation or infringement of public access, or in some cases, the damage was done. Removal of the structure would not result in any public benefits.

2. In many cases the coastal land owner who benefits from the shoreline structure didn't actually build it. It was built by previous owners.
3. All fines and revenues generated from these sources would be placed in the Land Division Special Beach Restoration Fund pursuant to Act 84, of the 1999 Session Laws. This money could then be used to enhance shoreline resources through beach restoration.

With respect to revenues, staff notes that there was quite a bit of discussion between legislators, environmentalists and DLNR over the appropriateness of generating revenues from unauthorized shoreline structures. However, based on the consideration, as stipulated in the previous section, that the removal of an unauthorized structure may not be the reasonable or desirable course of action, in every case, it was generally agreed that revenues could be generated from "existing" unauthorized shoreline structures. This policy would be subject to guidelines and procedures discussed in this section.

Land Division staff has identified hundreds of potential encroachments in the main Hawaiian Islands that have yet to be resolved. These encroachments were identified through several sources of information, including the shoreline certification process, citizen complaints, and County enforcement personnel. Some of these may have since been resolved.

As a natural resource management agency, CLP program objectives will consider the following criteria when dealing with shoreline encroachments:

1. Protect/preserve/enhance public shoreline access;
2. Protect/preserve/enhance public beach areas;
3. Protect adjacent properties; and
4. Protect property and important facilities/structureserosion damages.
5. Implement a "no tolerance" policy for recent or new unauthorized shoreline structures.

Removal of a structure due to resource concerns would generally be considered in light of the structure's engineering purpose (i.e., what is it protecting and what are the attendant economic values of the things protected). Also, mitigating factors would be considered -i.e., to what extent adjacent shoreline structures have influenced shoreline processes in the vicinity. But if the structure provides value to the adjacent landowner (e.g., protection/enhancement) and none of the first three criteria are jeopardized by its presence, the State may issue an easement for the encroachment.

There are certainly cases in which an encroachment protects important facilities/structures, but also has equal significant impacts on the quality of the public beach or access to the beach. A policy of summary removal could result in significant damages to private and/or public facilities/structures. Prosecution of these cases could also lead to costly litigation and significantly drain staff resources. In such cases, CLP staff will proceed carefully and weigh all of the consequences, impacts and benefits of a particular action.

These decisions would not occur in a vacuum. The Land Division has made significant progress over the past three years in the area of coastal erosion management. There is a heightened awareness of the causes and consequences of beach loss on a sector-by-sector basis, with more resources and data available to improve decision-making. There is the reality that shoreline structures are a permanent part of Hawaii's shoreline environment and that decisions must be made with this consideration in mind. In the long term, some shoreline structures may be phased-out, but this will require time, money and willpower.

In applying an enforcement procedure, one cannot ever lose sight of its use as a regulatory tool to reduce noncompliance with State laws and as a tool to eliminate public nuisances. A no tolerance policy should be implemented to deal with blatant offenders.

Because there are likely hundreds of encroachments in the State, lack of staff resources only allow for case-by-case disposition. Nevertheless, staff may consider and weigh each situation on its own merits provided that the guidelines described in this submittal are established and adhered to.

The Board of Land and Natural Resources must affirm the guidelines to add legitimacy and direction to the Coastal Lands Program's efforts.

The following procedures are proposed to address unauthorized shoreline structures:

1. Staff decides to prosecute a case based on a complaint or through prioritization of existing cases based on available staff resources.
2. Staff notifies the abutting property owner of the problem in writing and requests a site inspection.
3. Staff meets with the responsible County regulatory authority to discuss and resolve regulatory/jurisdictional issues.

4. Staff conducts on-site inspection.
5. Staff compiles information about the site including identification of coastal cell, identification of public access and use of the area, nature of fronting beach, if any, as well as other introduced manmade structures that may have influenced shoreline processes in the vicinity.
6. Staff gathers information on extent of encroachment, when it originally occurred, and the responsible party. Staff also gathers information whether encroachment affects neighboring properties.
7. Staff evaluates whether removal of the encroachment will further degrade the environment (sedimentation), or the level of mitigation to be gained by removal. This will require some knowledge of the erosion history at the site.
8. Staff considers information in light of the following guidelines:
 - a. Protect/preserve/enhance public shoreline access;
 - b. Protect/preserve/enhance public beach areas;
 - c. Protect adjacent properties; and
 - d. Protect property and important facilities/structures from erosion damages.
 - e. Apply "no tolerance" policy for recent or new unauthorized shoreline structures.

After this information is collated/analyzed, staff will recommend the issuance of either a short term revocable permit, a long-term easement, a lease fee based on avoided cost, or order it to be removed. The matter will first require resolution through the HOAPS system.

In cases where the abutting property owner refuses to remove the wall and/or pay the fine, the State may remove the wall and bill the owner.

DISCUSSION:

The revised plan represents an improvement over the plan approved by the Board in November 1997. The plan is better organized and contains additional information that supports the fundamental concepts and recommendations of DLNR erosion management. Staff has tried to ensure that the revisions are consistent with the original intent and content of COEMAP.

As stated in the November 1997, staff report, adoption of the plan does not trigger any of the State's Environmental Requirements, nor any State, County or Federal permits. It is a new resource guide for homeowners, policy formers and regulators to use in their daily functions.

The Maui County Council, the City Council of Honolulu, the State Marine and Coastal Zone Management Group (MACZMAG) and numerous other bodies have already adopted the Plan in some form.

Adoption of revisions to COEMAP by the Board will establish a strategic framework to guide the State's efforts towards coastal and beach erosion problem management, with the understanding that specific actions will be developed and implemented in cooperation with and by the respective State, County and Federal agencies with coastal zone responsibility.

Staff, therefore, recommends as follows:

RECOMMENDATION:

That the Board of Land and Natural Resources (Board):

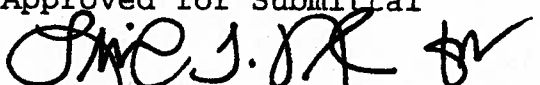
1. Adopt the revised policies and recommendations of the Hawaii Coastal Erosion Management Plan as the strategic framework to guide the State's efforts towards coastal and beach erosion problem management;
2. Approve minutes of the April 8, 1999 briefing;
3. Approve the proposed work plan for 1999-2000 with the provision that the Land Division can adjust the plan based on newly evolving needs; and
4. Authorize procedures to manage encroachments and the remittance of fines and revenues from existing unauthorized shoreline structures to be placed in the Special Beach Restoration Fund, pursuant to procedures as set forth in this report.

Respectfully Submitted,


SAMUEL J. LEMMO
Staff Planner

Attachment (s)

Approved for Submittal


TIMOTHY E. JOHNS, CHAIRPERSON
Board of Land and Natural Resources

2018 SEP -7 A 11:13

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W. M. YATES

CLERK

Attorneys for Plaintiff
STATE OF HAWAII

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

vs.

JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise
O'Shea Trust, JAMES O'SHEA,
individually and DENISE O'SHEA,
individually, JOHN AND JANE DOES 1
- 10,

Defendants.

CIVIL NO. 17-1-1543-09 JPC
(Injunction, Other Civil Action)
(Environmental Court)

SECOND AMENDED COMPLAINT FOR
INJUNCTIVE RELIEF; SUMMONS

SECOND AMENDED COMPLAINT FOR INJUNCTIVE RELIEF

I. JURISDICTION

1. The Court has jurisdiction over this matter pursuant to Hawaii Revised Statutes ("HRS") §§ 603-21.5 and 603-23 (1993 Repl.) (2000 Supp.).
2. Venue is proper pursuant to HRS § 603-36(5) (1993 Repl.).

Exhibit C

I do hereby certify that this is a full, true, and
correct copy of the original on file in this office.

Clerk, Circuit Court, First Circuit

II. PARTIES

3. Plaintiff, State of Hawai‘i, is the sovereign. The Department of Land and Natural Resources (“DLNR”) is a department of the State and the Office of Conservation and Coastal Lands (“OCCL”) is a division of DLNR. The Division of Conservation and Resource Enforcement (“DOCARE”) is the law-enforcement division of DLNR.

4. The DLNR is an executive department of the State of Hawai‘i responsible for protection of Hawaii’s natural resources.

5. The OCCL is a division of DLNR and is responsible for overseeing private and public lands that lie within the State Land Use Conservation District.

6. The Defendants James and Denise O’Shea as Trustees of the James and Denise O’Shea Trust own the property located at 59-171 D Ke Nui Road, Haleiwa, Hawai‘i in the County of Honolulu (“the subject property”).

7. Defendants James and Denise O’Shea reside at the subject property. (Defendants James and Denise O’Shea, in their capacities as Trustees of the James and Denise O’Shea Trust and individually, shall be collectively referred to as “the Defendants.”).

8. Defendants JOHN AND JANE DOES 1 – 10 are persons or entities who have or may have leasehold rights, lien rights, or other claims, interests, or concerns in or liabilities arising in connection with the property which is the subject of this action. The State has reviewed its own records and files in a good faith effort to ascertain the true names and identities of these parties.

III. FACTUAL ALLEGATIONS

9. The Courts have defined the ownership line that delineates private shoreline property from state property as the upper reaches of the wash of the waves, usually evidenced by

the edge of vegetation growth, or by the line of debris left by the wash of the waves. *In re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973).

10. All land seaward of the upper reaches of the wash of the waves belongs to the State. *Sotomura*, 55 Haw. at 184, 517 P.2d at 63.

11. The presence of an unpermitted structure that impedes the upper reaches of the wash of the waves does not impact the ownership line. The ownership line is to where the upper reaches of the wash of the waves would extend but for the unpermitted structure.

12. The subject property abuts, and is immediately mauka¹ of, the ownership line.

13. On or about September 3, 2017, a seawall (“old seawall”) that benefitted the subject property collapsed onto State land makai² of the subject property.

14. On or about September 5, 2017, workers acting on behalf of Defendants dug a trench on State land makai of the collapsed old seawall. DOCARE was notified.

15. On or about September 8, 2017, an operator on a backhoe machine acting on behalf of Defendants moved boulders on the makai side of the collapsed old seawall. DLNR staff informed the construction team that the landowners did not have permits for work on State land and told them to stop.

16. DLNR left notice of violation and order in the Defendants’ mailbox on September 8, 2017.

¹ “Mauka” refers to “[i]nland, upland, towards the mountain [.]” Mary Kawena Pukui & Samuel H. Elbert, *Hawaiian Dictionary* 242, 365 (Rev. ed.1986).

² “Makai” means “on the seaside, toward the sea, in the direction of the sea.” *Hawaiian Dictionary* 114 (Rev. ed.1986).

17. On or about September 8, 2017, Mr. O'Shea called DLNR staff. DLNR staff verbally informed him of the violations, and Mr. O'Shea agreed to stop the work.
18. On or about September 16, 2017, workers acting on behalf of Defendants continued construction makai of the subject property on State land. DLNR staff observed new, additional boulders on the beach.
19. On or about September 20, 2017, workers acting on behalf of Defendants operated heavy machinery on State land makai of the subject property. DLNR staff observed boulders and fill material on State land.
20. Workers acting on behalf of Defendants constructed a new seawall ("new seawall") makai of the subject property on State land.
21. Defendants never sought permission to build a new seawall on State land and failed to file an application for a permit or emergency permit to conduct the construction work on State land.
22. Despite the fact that they had no authority or permission, the Defendants completed construction of the new seawall.
23. The new seawall is unpermitted.
24. Waves wash up to and against the new seawall.
25. The new seawall does not affect the ownership line. But for the existence of the unpermitted new seawall, the highest wash of the waves would be mauka of the new seawall.
26. The State owns all land makai of where the highest wash waves would be but for the illegal and unpermitted new seawall ("the State land").
27. The new seawall is located on, and constitutes a trespass or encroachment upon, State land.

28. The debris from the old seawall is also located on and constitutes a trespass or encroachment on State land without permission or authority.

29. The new seawall and the debris from the old seawall are both located within the conservation district over which OCCL has regulatory responsibility.

30. The new seawall and construction debris on the State land pose a threat to the public and to the natural resources for which DLNR and OCCL are responsible.

31. According to HRS § 183C-1, the purpose of the conservation district is to conserve, protect, and preserve the important natural resources of the State through appropriate management and use to promote their long-term sustainability and the public health, safety and welfare.

32. Pursuant to HRS § 183C-6, the DLNR, through OCCL, regulates land use in the conservation district by the issuance of permits.

33. Pursuant to Hawaii Administrative Rules (“HAR”) § 13-5-30, DLNR regulates land uses in the conservation district by the issuance of departmental, board or emergency permits, temporary variances, site plan approvals or management plan or comprehensive management plan approvals.

34. HAR §13-5-35 provides for the issuance of emergency permits for any land use deemed to be essential to alleviate any emergency that is a threat to public health, safety and welfare, including natural resources, and for any land use that is imminently threatened by natural hazards.

35. The permit process is critical to DLNR and OCCL’s duty to protect and preserve the natural resources.

36. The Defendants failed to obtain the necessary permits for construction of the new seawall in the conservation district making the new seawall an unpermitted structure.

37. The State seeks injunctive relief to have the new seawall removed from the State land in addition to the debris from the collapsed old seawall.

38. A permanent injunction is proper because there are no adequate legal remedies.

39. The State is entitled to a permanent injunction because it will prevail on the merits, the balance of irreparable damage favors the issuance of a permanent injunction and the public interest supports granting a permanent injunction.

COUNT 1-
HRS § 669-1 QUIET TITLE/DECLARATORY JUDGMENT

40. Plaintiff realleges and incorporates by reference paragraphs 1 - 39 as though set out fully herein.

41. The State owns the State land in fee simple as a public trust unencumbered by any other claim or interest.

42. Defendants' illegal, unpermitted new seawall and debris from the collapsed old seawall are located on the State land.

43. Defendants claim or may claim that they own or have an interest in the State land. The State denies any such ownership, interest or claim.

44. The State brings this action pursuant to HRS §669-1(a) for the purpose of determining Defendants' adverse claim.

45. The State seeks a declaration pursuant to HRS § 669-1(a) that it is the owner of the land that is under the new seawall.

COUNT II-
TRESPASS

46. Plaintiff realleges and incorporates by reference paragraphs 1 - 45 as though set out fully herein.

47. The Defendants' new seawall and old seawall debris is located on State land.

48. Defendants intentionally or negligently trespassed onto State land by having heavy equipment enter the State land.

49. Defendants intentionally trespassed, and continue to trespass, onto State land by leaving boulders, dirt and construction debris on the State land that is makai of the subject property and by constructing a new seawall on State land without authority or permission.

50. It was foreseeable that Defendants' actions would interfere with the State's land use and public use of the beach.

51. The Defendants' trespass with the new, unpermitted seawall, and significant debris from the old seawall caused and continues to cause actual and substantial damages. The trespass prevents the State's and the public's right to use the land and creates a safety hazard to the public.

52. Injunctive relief is needed to order the Defendants to remove the seawall and restore the beach to its prior condition for the public's use and enjoyment and to protect public-trust resources.

COUNT III-
ENCROACHMENT

53. Plaintiff realleges and incorporates by reference paragraphs 1 - 52 as though set out fully herein.

54. The State owns the land on which the Defendants constructed the new seawall and where the debris from the old seawall was left.

55. The Defendants constructed the new seawall on State land without authority or permits.

56. The unpermitted seawall and debris from the old seawall encroach onto State land.

57. Injunctive relief is needed to order the Defendants to remove the new seawall and debris from the old seawall and return the beach to its prior condition for the public's use and enjoyment and to protect public-trust resources.

WHEREFORE, Plaintiff requests the following relief:

A. An order from the Court pursuant to HRS § 669-1(a) that the State owns the State land in fee simple free and clear of any interest or claim by Defendants or any of them.

B. That the Court enter a permanent injunction order:

(1) Enjoining Defendants from maintaining the new seawall on State property.

(2) Ordering that the new seawall and the remains of the old seawall and all related construction debris be removed in accordance with all State requirements;

(3) Awarding damages to the State for repairing the natural resources affected by Defendants' illegal actions including, but not limited to, the removal of debris, fill, boulders, and seawalls.

(4) Granting Plaintiff such other relief as this Court may deem appropriate and just under the premises.

DATED: Honolulu, Hawai'i, September 7, 2018.

A handwritten signature in black ink, appearing to read "A. Weston", is positioned above a horizontal line.

AMANDA J. WESTON
Deputy Attorney General
Attorney for Plaintiff
STATE OF HAWAI'I

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I,

Plaintiff,

vs.

JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise
O'Shea Trust, JAMES O'SHEA,
individually and DENISE O'SHEA,
individually, JOHN AND JANE DOES 1
– 10,

Defendants.

CIVIL NO. 17-1-1543-09 JPC
(Other Civil Action, Injunctive Relief)
(Environmental Court)

SUMMONS

SUMMONS

TO: ABOVE-NAMED DEFENDANTS

YOU ARE HEREBY SUMMONED and required to file with the Clerk of this Court and serve upon AMANDA J. WESTON, ESQ., attorney for plaintiff, whose address is 465 King Street, Suite 300, Honolulu, Hawai'i 96813, an answer to the Second Amended Complaint for Injunctive Relief which is herewith served upon you, within 20 days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the ^{Second Amended} Complaint. *JS*

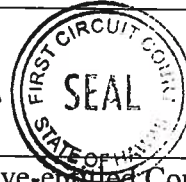
THIS SUMMONS SHALL NOT BE PERSONALLY DELIVERED BETWEEN 10:00 P.M. AND 6:00 A.M. ON PREMISES NOT OPEN TO THE GENERAL PUBLIC, UNLESS A JUDGE OF THE ABOVE-ENTITLED COURT PERMITS, IN WRITING ON THIS SUMMONS, PERSONAL DELIVERY DURING THOSE HOURS.

A failure to obey this summons may result in entry of default and default judgment against the disobeying person or party.

DATED: Honolulu, Hawai'i _____

SEP 07 2019

N. MIYATA



Clerk of the Above-entitled Court

2018 SEP 17 P 2:24

Of Counsel:
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Attorneys for Defendants
JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

vs.

JAMES O'SHEA AND DENISE O'SHEA as
Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually, JOHN AND
JANE DOES 1 - 10,

Defendants.

CIVIL NO. 17-1-1543-09 JPC
(Other Civil Action, Injunctive Relief)
(Environmental Court)

**DEFENDANTS' ANSWER TO
SECOND AMENDED COMPLAINT
FOR INJUNCTIVE RELIEF FILED
SEPTEMBER 7, 2018;
COUNTERCLAIM; CERTIFICATE
OF SERVICE**

No trial date set.

**DEFENDANTS' ANSWER TO SECOND AMENDED COMPLAINT
FOR INJUNCTIVE RELIEF FILED SEPTEMBER 7, 2018**

Defendants JAMES O'SHEA AND DENISE O'SHEA as Trustees of the James
and Denise O'Shea Trust, JAMES O'SHEA, individually and DENISE O'SHEA, individually

Exhibit D

Answer CC
due Sept. 27
2018 SEP 17 P 2:38
LAND/TRANS. DIV.
DEPARTMENT OF
ATTORNEY GENERAL

("Defendants"), for their Answer to Plaintiff STATE OF HAWAII's ("State") Second Amended Complaint for Injunctive Relief filed September 7, 2018 ("SAC"), alleges and avers as follows:

1. Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations contained in paragraphs 1 through 5, and 8 of the SAC and therefore deny the same.

2. Defendants admit the allegations contained in paragraphs 6 and 7 of the SAC.

3. In response to the allegations contained in paragraphs 9, 10, and 11 of the SAC, Defendants respond that *In re Application of Ashford*, 50 Haw. 314, 440 P.2d 76 (1968), *County of Hawaii v. Sotomura*, 55 Haw. 176, 517 P.2d 57 (1973) stands for itself, and Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in the paragraph and therefore deny the same.

4. In response to the allegations in contained paragraph 12 of the SAC, Defendants admit that the subject property abuts and is immediately mauka of State land and are without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in the paragraph and therefore deny the same.

5. In response to the allegations contained in paragraph 13 of the SAC, Defendants admit that the seawall collapsed on or about September 3, 2017, and are without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in the paragraph and therefore deny the same.

6. In response to the allegations contained in paragraphs 14 and 15 of the SAC, Defendants admit that they hired emergency personnel to stabilize their property and are

without information or knowledge sufficient to form a belief as to the truth or falsity of the remaining allegations contained in the paragraph and therefore deny the same.

7. In response to the allegations contained in paragraph 16 of the SAC, Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

8. In response to the allegations contained in paragraph 17 of the SAC, Defendants admit calling the Department of Land and Natural Resources ("DLNR"), and deny the characterizations of the substance of the conversation.

9. In response to the allegations contained in paragraphs 18, 19, and 20 of the SAC, Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

10. In response to the allegations contained in paragraph 21, 22, and 23 of the SAC, Defendants admit an application was not filed but deny that DLNR was not informed of the emergency and deny the remainder of the allegations and therefore deny the same.

11. In response to the allegations contained in paragraph 24 of the SAC, Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

12. In response to the allegations contained in paragraphs 25 through 30 of the SAC, Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

13. In response to the allegations contained in paragraphs 31 through 34 of the SAC, Defendants respond that the statutes and rules referenced stand for themselves, and

Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

14. In response to the allegations contained in paragraph 35 of the SAC, Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

15. In response to the allegations contained in paragraph 36 of the SAC, Defendants admit an application was not filed but deny that DLNR was not informed of the emergency and deny the remainder of the allegations and therefore deny the same.

16. Paragraph 37 of the SAC is a statement of the State's claim and does not require a response.

17. In response to the allegations contained in paragraphs 38 and 39 of the SAC, Defendants are without information or knowledge sufficient to form a belief as to the truth or falsity of the allegations and therefore deny the same.

18. Any allegations of the SAC not specifically admitted above are hereby denied.

COUNT I
HRS § 669-1 QUIET TITLE/DECLARATORY JUDGMENT

19. In response to the allegations contained in paragraph 40, Defendants incorporate and restate its specific answers to all preceding paragraphs as though fully set forth herein.

20. Defendants deny allegations contained in paragraphs 41 through 43 of the SAC.

21. In response to the allegations contained in paragraphs 44 and 45, HRS § 669-1(a) speaks for itself.

COUNT II
TRESPASS

22. In response to the allegations contained in paragraph 46, Defendants incorporate and restate its specific answers to all preceding paragraphs as though fully set forth herein.

23. Defendants deny allegations contained in paragraphed 47 through 52 of the SAC.

24. Defendants deny that the State is entitled to any of the relief requested.

COUNT III
ENCROACHMENT

25. In response to the allegations contained in paragraph 53, Defendants incorporate and restate its specific answers to all preceding paragraphs as though fully set forth herein.

26. In response to allegations contained in paragraphs 54 through 57 of the SAC.

27. Defendants deny that the State is entitled to any of the relief requested.

FIRST DEFENSE

28. The SAC fails to state a claim upon which relief can be granted.

SECOND DEFENSE

29. Defendants deny that Plaintiff sustained damage.

THIRD DEFENSE

30. Plaintiff is barred from maintaining this action against Defendants by reason of its own negligence and wrongful conduct.

ADDITIONAL DEFENSES

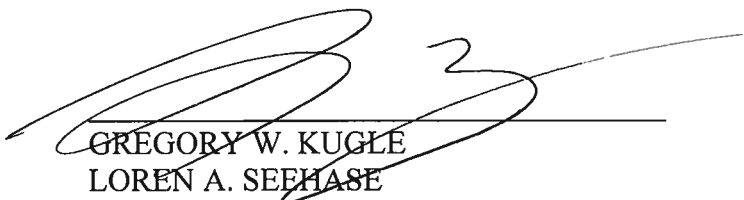
31. Defendants give notice of their intention to rely on the additional affirmative defenses of set-off, accord and satisfaction, no condition precedent, consent, assumption of risk, impossibility, impracticability, election of remedies, and any other matter constituting an avoidance or affirmative defense, including all defenses set forth in Rule 8(c) of the Hawai'i Rules of Civil Procedure.

32. Defendants incorporate by reference each and every defense heretofore asserted in this action, and reserve the right to assert additional defenses as they become apparent during the course of this litigation.

WHEREFORE, Defendants pray as follows that:

- A. The SAC be dismissed with prejudice;
- B. Defendants be awarded their costs and attorney's fees; and
- C. Defendants be awarded such other and further relief as the Court may deem just and proper.

DATED: Honolulu, Hawaii, September 17, 2018.



GREGORY W. KUGLE
LOREN A. SEEHASE
VERONICA A. NORDYKE
Attorneys for Defendants
JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

vs.

JAMES O'SHEA AND DENISE O'SHEA as
Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually, JOHN AND
JANE DOES 1 - 100,

Defendants.

CIVIL NO. 17-1-1543-09 JPC
(Other Civil Action, Injunctive Relief)
(Environmental Court)

COUNTERCLAIM

COUNTERCLAIM

Defendants JAMES O'SHEA and DENISE O'SHEA as Trustees of the James and Denise O'Shea Trust, JAMES O'SHEA, individually and DENISE O'SHEA, individually (collectively "O'Shea's"), for their Counterclaim against the Plaintiff STATE OF HAWAII ("State"), alleges and avers as follows:

INTRODUCTION

1. Rather than taking responsibility for the collapse of its seawall, the State is attempting to penalize adjacent property owners, the O'Shea's, for taking measures to protect their lives, home, and Property.

PARTIES

2. Defendants JAMES O'SHEA and DENISE O'SHEA as Trustees of the James and Denise O'Shea Trust, JAMES O'SHEA, individually and DENISE O'SHEA, individually, are and were at all relevant times mentioned here in, residents of the State of Hawaii.

3. Plaintiff STATE OF HAWAII is a state and it has waived sovereign immunity pursuant to Haw. Rev. Stat. § 661-1.

DNK 4. DOE DEFENDANTS 1-100 (collectively, "DOE Defendants") are persons, governments, entities, agents or estates which are in some manner presently unknown to Plaintiff, and who are liable for the claims for relief set forth in this Complaint. Plaintiff is presently unaware of the true names and capacities of the DOE Defendants but will amend the Complaint as soon as they are ascertained.

JURISDICTION AND VENUE

A 5. This court has jurisdiction over this matter and the parties pursuant to Haw. Rev. Stat. §§ 603-21.5, 661-1, 632-1 and 634-35.

A 6. Venue is proper in the First Circuit pursuant to Haw. Rev. Stat. § 603-36.

FACTS

The Seawall

DNK 7. On or around 2001, the O'Shea's purchased the property located at 59-171 D Ke Nui Road ("Property").

A 8. The O'Shea's reside in a single family home on the Property along with their two young daughters.

D 9. A seawall exists just makai of the O'Shea's Property line (the "Seawall"). The O'Shea's relied on the Seawall to protect their Property.

D 10. Upon information and belief, the Seawall was built in the early 1950's by or for the State of Hawaii, on State property.

D 11. The State has failed to maintain the Seawall.

D 12. The State has allowed the Seawall to deteriorate, jeopardizing the O'Shea's lives, home, and Property.

D 13. The State has denied the O'Shea's requests to protect the Seawall and their Property, while allowing nearby property owners to property their properties.

The Collapse

14. On or around September 3, 2017, a portion of the Seawall in front of the Property collapsed, causing loss of support of the Property, resulting in loss of and damage to the Property and threatening imminent destruction of or damage to their slab-on-grade home and associated infrastructure.

15. This collapse was directly or proximately caused by the State's failure to maintain the Seawall and/or the State's negligent or intentional acts or omissions.

16. The collapse caused a loss of lateral and subjacent support and created an imminent danger to the O'Shea's lives, home, and Property, as well as the loss of significant and valuable portions of their Property.

17. Failure to take immediate action would have resulted in near certain loss of more of the Property, loss of the O'Shea's home, damage to the beach, release of sediment and debris into the ocean, and possible loss of life.

18. O'Shea's actions consisted solely of efforts to stabilize their Property and home, and to prevent further collapse of the wall.

COUNT I – Declaratory Relief

19. O'Shea's hereby incorporate and adopt each and every allegation in the preceding paragraphs.

20. The State had an affirmative duty to maintain its Seawall that was constructed on its property and/or to allow the O'Shea's to take measures to protect their Property.

21. O'Shea's are entitled to a declaration that the State owns and is responsible for the maintenance and repair of the Seawall

22. O'Shea's are entitled to a declaration that the State breached its affirmative duty to maintain the Seawall.

COUNT II – Negligence

— 23. O'Shea's hereby incorporate and adopt each and every allegation in the preceding paragraphs.

D 24. The State had and has a duty to maintain the Seawall it built or was built on the State's behalf.

D 25. The State breached this duty by failing to maintain the Seawall.

D 26. This breach was a direct or proximate cause of the Seawall collapse.

D 27. Because of the State's breach, the O'Shea's are entitled to compensation and damages related to the Seawall collapse.

COUNT III – Loss of Lateral and Subjacent Support

— 28. O'Shea's hereby incorporate and adopt each and every allegation in the preceding paragraphs.

D 29. As a direct or proximate result of the State's failure to maintain the Seawall, the O'Shea's Property was damaged, including but not limited to loss of lateral and subjacent support, and inundation with debris.

D 30. The State, as the O'Shea's neighbor, acted negligently by failing to maintain the Seawall.

D - 31. The State is strictly liable for damages caused by the collapsed Seawall.

D 32. O'Shea's are entitled to compensation for damages related to the collapsed Seawall.

COUNT IV – Diminution in Property Value

— 33. O'Shea's hereby incorporate and adopt each and every allegation in the preceding paragraphs.

D 34. As a direct or proximate result of the inaction of the State to maintain the Seawall, the Property has significantly depreciated in value.

D 35. Accordingly, O'Shea's are entitled to compensation and/or damages for or related to the diminution in property value caused by the State's failure to maintain the Seawall.

COUNT V – Nuisance

36. O'Shea's hereby incorporate and adopt each and every allegation in the preceding paragraphs.

D 37. The State's failure to maintain or repair the collapse Seawall interferes with the O'Shea's right to peaceably enjoy their Property.

D 38. As a result, the State's inaction is a nuisance.

COUNT VI – Inverse Condemnation

39. O'Shea's hereby incorporate and adopt each and every allegation in the preceding paragraphs.

DNK 40. O'Shea's possess constitutionally recognized and protected property interests.

D 41. The State by its actions alleged hereinabove, without legal authority and without providing just compensation and/or damages has taken the O'Shea's Property to wit, *inter alia*: loss of Property caused by the Seawall collapse.

D 42. O'Shea's are therefore entitled to just compensation and damages for the taking of their Property.

PRAYER FOR RELIEF

WHEREFORE, Defendants respectfully request:

A. That the Court enter judgment in favor of the O'Shea's and against the State, granting the O'Shea's the remedy of declaratory relief, injunctive relief, and damages;

B. That the Court issue a declaration that the State owns and is responsible for the maintenance and repair of the Seawall;

C. That the Court issue an order requiring the State to immediately repair and maintain the Seawall.


D. That the Court issue an order finding that the O'Shea's are entitled to all remedies available under Hawaii law if the State should fail to immediately and adequately repair and maintain the Seawall.

E. The O'Shea's be awarded damages as proven at trial;

F. The O'Shea's be awarded their reasonable attorneys' fees and costs; and

G. The court award other and further relief as it deems proper.

DATED: Honolulu, Hawaii, September 17, 2018.



GREGORY W. KUGLE
LOREN A. SEEHASE
VERONICA A. NORDYKE
Attorneys for Defendants
JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT
STATE OF HAWAII

STATE OF HAWAII,

Plaintiff,

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JAMES O'SHEA AND DENISE O'SHEA as
Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually, JOHN AND
JANE DOES 1 - 10,

Defendants.

CIVIL NO. 17-1-1543-09 JPC
(Other Civil Action, Injunctive Relief)
(Environmental Court)


CERTIFICATE OF SERVICE

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this date a true and correct copy of the foregoing document will be served on the following parties by hand delivery to their last known address as follows:

WILLIAM J. WYNHOFF
LINDA L.W. CHOW
AMANDA J. WESTON
Deputy Attorneys General
Department of the Attorney General, State of Hawaii
Room 300, Kekuanao'a Building
465 South King Street
Honolulu, HI 96813
Attorneys for Plaintiff
STATE OF HAWAII

DATED: Honolulu, Hawaii, September 17, 2018.


GREGORY W. KUGLE
LOREN A. SEEHASE
VERONICA A. NORDYKE
Attorneys for Defendants
JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually

Report on Impacts from the Seawall Constructed at 59-171 D Ke Nui Road, North Shore of O‘ahu

Prepared for: Lauren K. Chun, Deputy Attorney General, State of Hawai‘i

Prepared by: Bradley M. Romine, PhD, Coastal Geologist

Introduction

I, Bradley M. Romine, Ph.D., have nine years of professional experience in coastal processes and coastal hazards including working with local communities and government in applying the latest and best-available science to increase resilience to natural hazards and improve stewardship of coastal environments. As faculty (extension agent) with the University of Hawai‘i Sea Grant College Program (Hawai‘i Sea Grant), I work closely with the Hawai‘i Department of Land and Natural Resources – Office of Conservation and Coastal Lands (DLNR-OCCL) through a cost-share partnership, and interface with other federal, state, and county government offices and communities on collaborative projects to support coastal resource management, community planning, decision-making, and policy development, including work building on a 2017 State of Hawai‘i Sea Level Rise Vulnerability and Adaptation Report, which I contributed to. I also serve as University Consortium Deputy Director for the Pacific Islands Climate Adaptation Science Center, through which I work with the U.S. Geological Survey and university researchers to provide the best-available science on climate change and landscape-scale stressors to natural resource managers and communities throughout Hawai‘i and the U.S.-affiliated Pacific Islands. I completed my Ph.D. in Geology and Geophysics at the University of Hawai‘i at Mānoa in 2013 and have published peer-reviewed research articles on coastal geology, coastal change analysis, beach processes, shoreline change, and sea level rise impacts in Hawai‘i. My Curriculum Vitae is provided as Attachment 1.

Exhibit E

I am familiar with the geography, geology, and physical processes of the North Shore of O'ahu, including the shoreline area fronting the subject property at 59-171 D Ke Nui Road, Pūpūkea, Hawai'i, between Rocky Point and Sunset Beach Park, through my research and science extension work. My Ph.D. dissertation and peer-reviewed published research work includes historical shoreline change analysis of the region using archival and recent aerial photographs and topographic survey work documenting seasonal beach profile changes. My science work with the DLNR-OCCL over the last nine years has included numerous site visits to observe and document beach changes and erosion impacts along the subject shoreline and beachfront property and to meet and walk the site with affected shorefront residents and agency staff tasked with management and regulation of the shoreline area and shorefront development. Based on my experience and professional background in coastal processes studies, I state herein my opinions to a reasonable degree of scientific certainty concerning the processes of beach erosion and impacts of shorefront development on those processes and the natural beach (i.e., littoral) system.

The report describes the basis for my opinions, including my direct observations and knowledge that I have because of my previous research and professional experience. I have included photographs and maps that are helpful to explaining my opinion as exhibits in the report itself.

Opinions and Scientific Bases

Because of my direct experience, scientific research, and professional experience related to coastal processes in the subject area, I am providing my professional opinion on the following three questions related to the case as requested by the State of Hawai'i Department of the Attorney General.

Question #1. Was the seawall that currently sits in front of the O'Shea property (59-171 D Ke Nui Road, Pūpūkea, Hawai'i) makai of the shoreline (i.e., the highest wash of the waves at high tide during the season of the year in which the highest wash of the waves occurs) at the time it was built in September to October 2017?

The "Shoreline" is defined by State law and for the purpose of this report as "the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves" (Hawai'i Revised Statutes Chapter 205A-1, Definitions). It is my understanding that, in the practice of delineating and certifying a Shoreline, the State Land Surveyor considers "storm waves" in this definition to refer to waves from a named tropical storm or hurricane that directly affects the Hawaiian Islands. There were no named tropical storms that directly affected the North Shore of O'ahu in 2017.

From site visits I conducted leading up to and during the time that the seawall was constructed (September and October 2017) and photographs collected around that time period, it is my professional opinion that the seawall that currently sits in front of the O'Shea property was constructed makai (seaward) of where the Shoreline would have been located.

Exhibit 1 shows the failure of the O'Shea property seawall and erosion damage to their land in September 2017. It is my conclusion that the wash of the waves (i.e., wave runup) was reaching past the location of the failed seawall and apparently past the eventual location of the new seawall at that time as land was being scoured away (eroded) by wave action well behind the seawall, though the exact location where the shoreline would have been located is unknown.



Exhibit 1. Erosion damage to the neighboring and subject property showing that the wash of the waves was entering the properties causing erosion landward of the former seawall and apparently landward of where the new seawall was constructed. Image from O'Shea Documents Produced #1898; date unknown, 2017. The waves causing this erosion were driven by distant storm activity in the North Pacific combined with localized tradewind waves, and were not the result of a named tropical storm nor a tsunami (i.e., "seismic [sic] waves").

Exhibit 2 shows contractors working at the base of the original seawall as it began to fail in September 2017. A temporary plywood barrier has been installed in an attempt to stop wave runup from entering the property and further undermining and damaging the former seawall. Erosion damage to the subject property that is visible behind the temporary plywood barrier is further evidence that the wash of the

waves was entering the subject property landward of the former seawall and apparently landward of where the new seawall was constructed in the following weeks.



Exhibit 2. Photograph from September 5, 2017 showing the front of the subject property soon after the former/original seawall had begun to fail. The beach fronting the seawall is smooth and wet indicating repeated wave overwash and that wave runup was impacting the base of the seawall at that time. Workers are visible in the image constructing a temporary plywood barrier in an effort to prevent waves from continuing to wash into the section where the seawall had failed.

Exhibit 3 is a photograph from September 14, 2017 after most of the former seawall at the subject property had collapsed onto the beach due to ongoing wave runup and erosion of the property. Portions of the collapsed seawall are visible as concrete slabs lying on the beach. A temporary rock pile had been

placed by the owners to block waves from continuing to enter the property and to prevent further land loss from erosion. The beach at this time was narrow from seasonal wave erosion, which is apparent from the lack of dry beach due to the wash of the waves continuously impacting the seawall and temporary rubble pile. This evidence also supports that the upper reaches of the wash of the waves (i.e., the Shoreline) would have been landward of the temporary rock pile, into the O'Shea property, and seaward of where the seawall currently sits if the rocks were not placed there.



Exhibit 3. Photograph from September 14, 2017 showing the failed seawall fronting the subject property, which has collapsed onto the shoreline below and boulders that had been placed temporarily to block further wave runup from entering and eroding the property.



Exhibit 4. Satellite imagery from Google Earth from March 2016, prior to the seawall failure, showing the seaward edge of the beach (i.e., the beach toe; blue line), approximate Shoreline location at neighboring properties without seawalls using the vegetation line as a proxy location (green line), location of seawalls at the subject and neighboring properties (red line), and vicinity of where the Shoreline would migrate to if the existing seawalls were not there (orange line). The image shows how the failed seawall protruded out onto the beach, how the beach was substantially narrower fronting the seawalls at that time, and that the Shoreline location would be further landward if the seawalls had not been present.

Question #2. Is the subject seawall presently makai of where the shoreline would be if the wall were not there?

Exhibits 1-3 demonstrate that the high wash of the waves and resulting erosion was reaching into the subject property, landward of the former seawall and that the newly constructed seawall is apparently makai of where the shoreline would be if the wall were not there. Further analysis provided below demonstrates that the subject seawall is still presently makai of where the shoreline would be if the wall were not there.

The North Shore of O‘ahu, including the subject shoreline, is exposed to open-ocean North Pacific swell that reach 25 feet on an annual basis, and is generated by distant storms in the Northwest and North Pacific in winter months¹. The largest waves and therefore highest annual wash of the waves occurs on the North Shore in November through March from these swells. The subject seawall failed in early to mid-September prior to the typical peak of the North Shore winter wave season. Exhibit 5 from Fletcher, et al., 2012² shows daily average significant wave heights affecting the North Shore from a wave measurement buoy located about 320 miles northwest of Sunset Beach, O‘ahu. Based on this data, it is reasonable to assume that the annual highest wash of the waves would extend farther into the property than observed in September 2017 (prior to the peak of the North Shore winter wave season), and the shoreline would be located landward of where the seawall is presently located if the seawall were not there.

¹ Vitousek, S., and Fletcher, C., 2008, Maximum annually recurring wave heights in Hawaii: Pacific Science, v. 62, no. 4, p. 541–553.

² Fletcher, C.H., et al., 2012, National assessment of shoreline change: Historical shoreline change in the Hawaiian Islands: U.S. Geological Survey Open-File Report 2011–1051, 55 p.

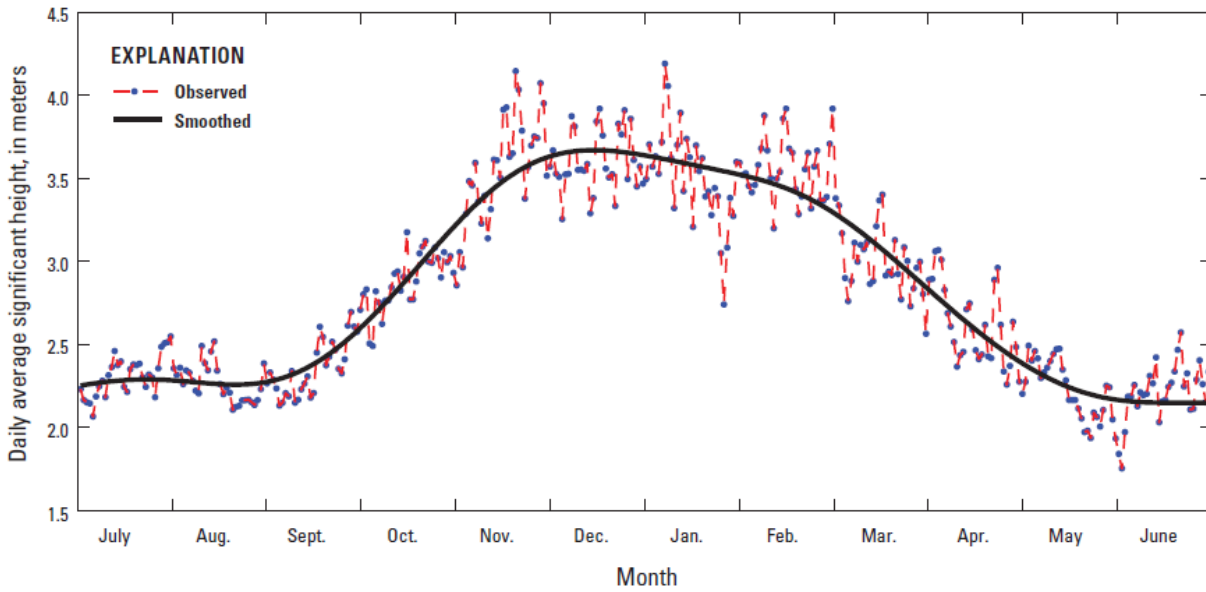


Exhibit 5. Daily average significant wave heights for waves affecting the North Shore of Hawai‘i from National Data Buoy Center Station 51001³ (1981 to 2005; located about 320 miles northwest of Sunset Beach, O‘ahu) showing that the largest waves, and therefore annual highest wash of the waves, typically affect the North Shore in November through March. Figure from Fletcher et al., 2012.

Exhibit 6 presents further evidence that the subject seawall is presently makai of where the shoreline would be if the wall were not there. Lines have been digitized on a 2019 Google Earth satellite image showing the approximate location of the Shoreline and existing seawalls. The subject and neighboring properties with seawalls extend substantially farther seaward, out into the beach than they would if the seawalls did not exist. If the properties were not armored, natural beach processes would act to erode the protruding section of Shoreline marked in red into a more linear configuration (orange line) aligned with the unarmored Shorelines marked in green. The Shoreline is kept unnaturally seaward and the beach is kept unnaturally narrow in that area by the presence of the seawalls. It is not possible to state exactly where the Shoreline would be without the seawalls, but it would likely be tens of feet landward

³ National Oceanic and Atmospheric Administration, National Data Buoy Center:
https://www.ndbc.noaa.gov/station_page.php?station=51001

of the seawalls if natural coastal process of wave runup and coastal erosion were not inhibited by the presence of the seawalls.



Exhibit 6. Satellite imagery from Google Earth from May 2019 showing the seaward edge of the beach (i.e., the beach toe; blue line), approximate Shoreline location at neighboring properties without seawalls using the vegetation line as a proxy location (green line), location of existing seawalls at the subject and neighboring properties (red line), and vicinity of where the Shoreline would migrate to if the existing seawalls were not there (orange line). The image shows how the existing seawalls protrude out onto the beach, how the beach is substantially narrower fronting the seawalls, and that the Shoreline location would be further landward if the existing seawalls were not present.

3. What effects, if any, has the seawall had on shoreline processes, beach loss, erosion, public access, or the coastal ecosystem?

The beach fronting the subject property is undergoing a long-term trend of erosion (net landward movement of the beach) of about 0.7 feet per year⁴. Historically, throughout Hawai'i, the typical response to coastal erosion has been construction of seawalls and other coastal armoring structures to protect coastal properties. The harmful effects of coastal armoring on beaches have been documented and studied in much detail on O'ahu⁵. When installed on an eroding beach, seawalls lead to beach narrowing and beach loss through a process called "coastal squeeze."⁶ As sand continues to be washed away fronting the seawall by ongoing erosion, the seaward edge of the beach (i.e., beach toe) continues to move landward toward the base of the fixed seawall, narrowing and ultimately pinching-off the beach. Beach sand is impounded behind the seawall that would otherwise be eroded through coastal processes to nourish and sustain the beach system, compounding the erosion and beach loss.

Beach loss is occurring fronting the subject property through the processes described above on a seasonal (i.e., intermittent) and long-term basis. The aerial image in Exhibit 6 was taken in May 2019 and shows the beach at or near its seasonal maximum width. Even at its widest, the beach fronting the seawall is substantially narrower than the beach fronting the neighboring unarmored properties where the Shoreline has migrated further inland and a more natural beach width has been sustained.

⁴ University of Hawai'i Coastal Geology Group, Hawai'i Shoreline Study web map: <http://www.soest.hawaii.edu/coasts/index.php/resources/hawaii-shoreline-study-web-map/>. Oahu, Sunset Transects 135 and 136.

⁵ Fletcher, C.H., et al., 1997, Beach loss along armored shorelines on Oahu, Hawaiian Islands. *J Coast Res* 13(1):209-215.

Fletcher, C.H., et al., 2012, National assessment of shoreline change: Historical shoreline change in the Hawaiian Islands: U.S. Geological Survey Open-File Report 2011-1051, 55 p.

Romine, B.M. and Fletcher, C.H. 2012, Armoring on Eroding Coasts Leads to Beach Narrowing and Loss on Oahu, Hawaii, in *Pitfalls of Shoreline Stabilization: Selected Case Studies*, J.A.G. Cooper, G. Andrew and O.H. Pilkey (eds.), Coastal Research Library 3, DOI 10.1007/978-94-007-4123-2_10.

⁶ E.g., Pontee, N., 2013, Defining coastal squeeze, A discussion. *Ocean & Coastal Management* 84:204-2017.

Beach narrowing becomes severe fronting the subject seawall on an intermittent basis, to the point that the beach is submerged and no dry is beach remaining, impeding natural coastal processes and alongshore public access (Exhibits 7-9). At these times, public alongshore access becomes unsafe fronting the seawall as waves repeatedly overwash concrete materials left from the former failed seawall and waves impact the new seawall. Natural limestone rock is also exposed at the base of the wall when the sand is lost, further impeding public access. This beach loss also blocks alongshore access by City & County of Honolulu lifeguards who conduct safety patrols and rescues on the beach using all-terrain vehicles.



Exhibit 7. Beach loss fronting the subject seawall in August 2018 inhibiting alongshore access and natural coastal processes.



Exhibit 8. Beach loss fronting the subject seawall in September 2020 showing loss of the natural beach ecosystem, which is critical habitat for endangered species including monk seal and sea turtles.



Exhibit 9. *Waves impacting and reflecting off of the subject seawall on February 2, 2021. Note that the beach is completely submerged (lost) in front of the seawall impeding alongshore public access. Offshore wave heights were about 6-7 feet⁷, well below the maximum annual wave heights of 25 feet that typically occur in winter months. These waves were driven by distant storm activity in the North Pacific, typical of winter months, and were not the result of a named tropical cyclone or tsunami.*

Sea levels are rising around Hawaii as a result of global mean sea level rise^{8,9,10}. Rates of shoreline change are expected to increase with increasing sea level rise such that periods of intermittent beach

⁷ NOAA National Data Buoy Center, Station 51001 – Northwestern Hawaii One, Quality Controlled data for February, 2021. https://www.ndbc.noaa.gov/station_history.php?station=51001

⁸ <https://climate.nasa.gov/>

⁹ <https://www.climate.gov/>

¹⁰ E.g., NOAA Tides & Currents, Relative Sea Level Trend for Honolulu, Hawaii: https://tidesandcurrents.noaa.gov/sltrends/sltrends_station.shtml?id=1612340

loss as depicted in Exhibits 7-9 will become more frequent, more severe, and ultimately permanent in a matter of years to decades fronting the subject seawall^{11,12}(Exhibit 10).

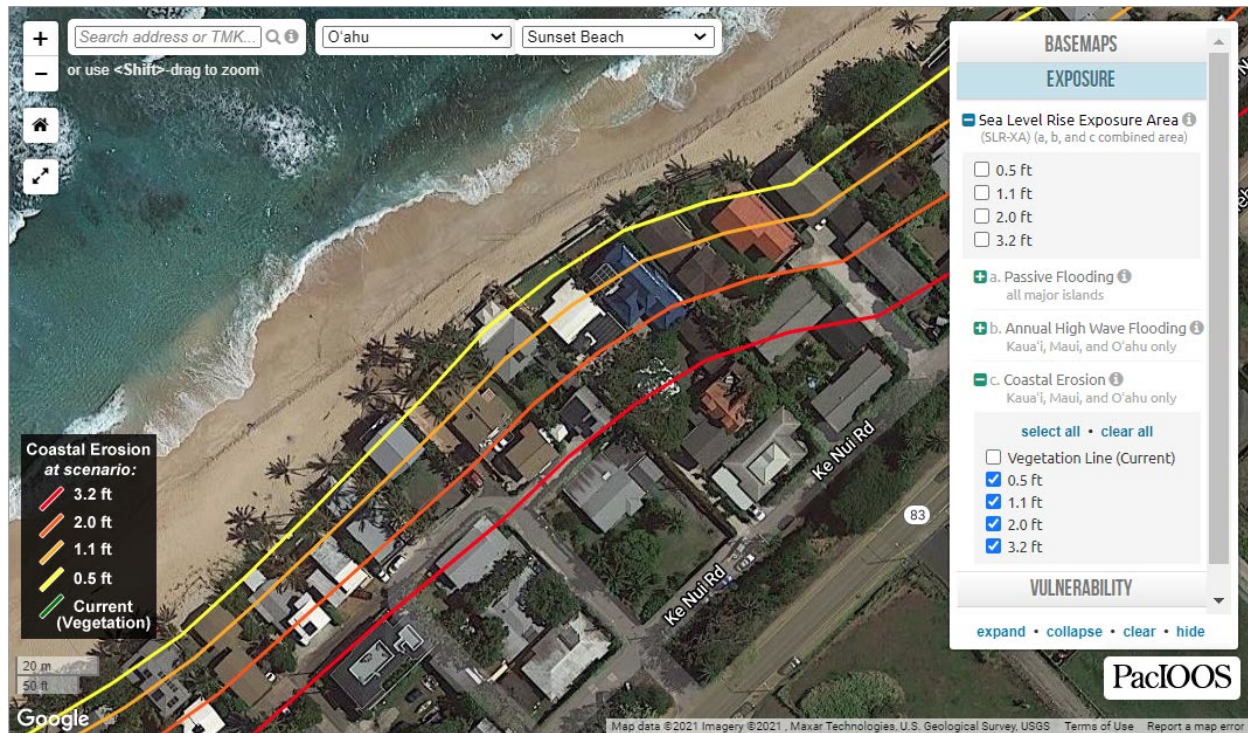


Exhibit 10. Coastal erosion hazard projections with 0.5, 1.1, 2.0, and 3.2 feet (yellow, light orange, orange, red, resp.) of sea level rise at the subject property, based in part on measured rates of historical shoreline erosion, from the State of Hawai'i Sea Level Rise Viewer. The projections assume an erodible backshore, i.e., no seawalls present. (hawaii.sealevelriseviewer.org).

¹¹ Anderson, T., et al., 2018. Modeling multiple sea level rise stresses reveals up to twice the land at risk compared to strictly passive flooding methods. *Nature Scientific Reports* 8: 14484 DOI:10.1038/s41598-018-32658-x

¹² Hawai'i Climate Change Mitigation and Adaptation Commission. 2021. State of Hawai'i Sea Level Rise Viewer. Version 1.04. Prepared by the Pacific Islands Ocean Observing System (PacIOOS) for the University of Hawai'i Sea Grant College Program and the State of Hawai'i Department of Land and Natural Resources, Office of Conservation and Coastal Lands, with funding from National Oceanic and Atmospheric Administration Office for Coastal Management Award No. NA16NOS4730016 and under the State of Hawai'i Department of Land and Natural Resources Contract No. 64064. <http://hawaii.sealevelriseviewer.org>. Accessed July 18, 2021.



Bradley M. Romine, PhD

Curriculum Vitae for
Bradley M. Romine, Ph.D.

EDUCATION

2013	Ph.D., Geology and Geophysics (coastal geology), University of Hawai'i at Mānoa (UHM)
2008	M.S., Geology and Geophysics (coastal geology), University of Hawai'i at Mānoa
1998	B.S., Physical Geography, University of California, Santa Barbara

PROFESSIONAL APPOINTMENTS

2012-present	<i>Extension Faculty</i> (Coastal Management and Resilience Specialist), Hawai'i Sea Grant; including cooperative agreement with the Hawai'i Department of Land and Natural Resources – Office of Conservation and Coastal Lands (DLNR-OCCL) for coastal and climate science extension services
2018-present	<i>University Consortium Deputy Director</i> , Pacific Islands Climate Adaptation Science Center

GRANTS AND CONTRACTS

2020-2022	Principal Investigator: Climate Change and Sea Level Rise Guidance for the North Shore Sustainable Communities Plan. \$22,896 under subcontract for the City and County of Honolulu.
2020-2021	Co-Investigator: Maui Island Coastal Dune Restoration for Improved Community Resilience and Habitat Enhancement. \$199,506 from the National Fish and Wildlife Foundation National Coastal Resilience Fund 2019.
2019-2024	Co-Investigator: Pacific Islands Climate Adaptation Science Center Cooperative Agreement. \$1.8 mil. 5-year university consortium funding from the U.S. Geological Survey.
2018-2019	Co-Investigator: Sea Level Rise and Climate Change White Paper and Guidance for the City and County of Honolulu Primary Urban Center Development Plan Update. \$39,992 under subcontract for the City and County of Honolulu.
2016-2021	Principal Investigator: Building Resilience to Coastal Hazards and Climate Change in Hawai'i. \$845,000 from the NOAA FY16 Regional Coastal Resilience Grants Program and \$100,000 from the DLNR-OCCL.
2016-2017	Principal Investigator: Technical Review of the National Shoreline Management Study. \$17,000 under subcontract for the U.S. Army Corps of Engineers.
2013-2021	Co-Investigator: DLNR-OCCL Coastal Lands Program Memorandums of Agreement for science and technical support. 2021-2024: \$178,751; 2019-2021: \$155,774; 2017-2019: \$156,390; 2015-2017: \$188,000; 2013-2015: \$165,000.

EXAMPLES OF PROJECT EXPERIENCE

Ongoing	Conducted over 100 invited presentations, workshops, and other outreach events and cited in over 50 media pieces related to coastal hazards, climate change, sea level rise, and coastal management since 2012.
Ongoing	Working with the DLNR-OCCL to guide and coordinate environmental impact statements for beach restoration at Waikīkī, O'ahu and Kā'anapali, Maui.
Ongoing	Coordinating development of a statewide programmatic environmental assessment and update to the DLNR-OCCL's small-scale beach restoration permitting program.
Ongoing	Developing a technical white paper (in-prep) and guiding the Honolulu Department of Planning and Permitting in integrating climate change and sea level rise considerations in the North Shore Sustainable Communities Plan update.
Ongoing	Completed a technical white paper (2019) and guiding the Honolulu Department of Planning and Permitting in integrating climate change and sea level rise considerations in the Honolulu Primary Urban Center Development Plan update.
Ongoing	Developing guidance documents for integrating climate change, sea level rise, and coastal hazards resilience considerations into local governments' planning and policy (see: Technical Reports).

- 2018 Provided technical guidance on climate change and sea level rise hazards to the Hawaii Department of Emergency Management for the update of the *State Hazard Mitigation Plan* (October 2018) as a member of the State Hazard Mitigation Forum.
- 2017 Provided writing, scientific guidance, and statewide outreach for the *State of Hawai'i Sea Level Rise Vulnerability and Adaptation Report*.
- 2017 Led the development of the *Hawai'i Sea Level Rise Viewer*, an online interactive mapping tool as a companion to the State of Hawai'i Sea Level Rise Vulnerability and Adaptation Report.
- 2016 Provided technical review and input for the development of the Hawaiian Islands instalment of the *National Shoreline Management Study* (published 2018) for the U.S. Army Corps of Engineers.

PEER-REVIEWED PUBLICATIONS

- Summers, A., Fletcher, C.H., Spirandelli, D., McDonald, K., Over, J.-S., Anderson, T., Barbee, M., and Romine, B. (2018) *Failure to protect beaches under slowly rising sea level*, Climatic Change, 151.
- Anderson, T.R.; Fletcher, C.H.; Barbee, M.M.; Romine, B.M.; Lemmo, S.; and Delevaux, J. (2018) *Modeling multiple sea level rise stresses reveals up to twice the land at risk compared to strictly passive flooding methods*. Nature Scientific Reports, 8.
- Romine, B.M.; Fletcher, C.H.; Frazer, L.N.; Anderson, T.R. (2016) *Beach erosion under rising sea level modulated by coastal geomorphology and sediment availability on carbonate reef-fringed island coasts*. Sedimentology 63(5).
- Anderson, T.R.; Fletcher, C.H.; Barbee, M.M.; Frazer, L.N.; Romine, B.M. (2015) *Doubling of coastal erosion under rising sea level by mid-century in Hawaii*. Natural Hazards 78(1).
- Romine, B.M.; Fletcher, C.H.; Barbee, M.M.; Anderson, T.R.; and Frazer, L.N. (2013) *Are beach erosion rates and sea-level rise related in Hawai'i?* Global and Planetary Change, 108.
- Romine, B.M. and Fletcher, C.H. (2013) *A summary of historical shoreline changes along the islands of Kaua'i, O'ahu, and Maui; Hawai'i*. Journal of Coastal Research, 29(3).
- Romine, B.M. and Fletcher, C.H. (2012). *Armoring on eroding coasts leads to beach narrowing and loss on O'ahu, Hawai'i*, in Pitfalls of Shoreline Stabilization: Selected Case Studies, J.A.G. Cooper and O.H. Pilkey (eds.), Coastal Research Library Vol. 3, pp 141-164, Springer Science and Media, Dordrecht, Netherlands.
- Kane, H.; Fletcher, C.H.; Romine, B.M.; Anderson, T.R.; Frazer, L.N.; and Barbee, M.M. (2012). *Threats to cultural assets identified with shoreline trend analysis*. Journal of Coastal Research, 28(3).
- Romine, B.M.; Fletcher, C.H.; Genz, A.S.; Frazer, L.N.; Barbee, M.M.; Lim, S.C.; Smith, T., (2009). *Historical shoreline change, southeast O'ahu, Hawai'i; applying polynomial models to calculate shoreline change rates*. Journal of Coastal Research, 25(6).
- Norcross, Z.; Fletcher, C.H.; Barbee, M.M.; Genz, A.S.; and Romine, B.M. (2008) *Bringing sea-level rise into long range planning considerations on Maui, Hawai'i*. Proceedings: Solution to Coastal Disasters 2008.

TECHNICAL REPORTS

- Romine, B.M.; Eversole, D.; Hintzen, K.D. (in-prep). Climate Change & Sea Level Rise, A Technical Resource Paper for the North Shore Sustainable Communities Plan. For the City and County of Honolulu Department of Planning and Permitting, North Shore Sustainable Communities Plan update.
- Romine, B.M.; Habel, S.; Lemmo, S.J.; Pap, R.A.; Owens, T.M.; Lander, M.; Anderson, T.R. (2020). *Guidance for Using the Sea Level Rise Exposure Area in Local Planning and Permitting Decisions*. Prepared by the University of Hawaii Sea Grant College Program with the Hawai'i Department of Land and Natural Resources - Office of Conservation and Coastal Lands for the Hawai'i Climate Change Mitigation and Adaptation Commission - Climate Ready Hawai'i Initiative. (Sea Grant Publication TT-20-01).
- Courtney, C.A.; Romine, B.M.; Lander, M.; Hintzen, K.D.; Owens, T.M.; Pap, R.A. (2020). *Guidance for Addressing Sea Level Rise in Community Planning in Hawai'i*. Prepared by Tetra Tech, Inc. for the University of Hawai'i Sea Grant College Program and State of Hawai'i Department of Land and Natural Resources and Office of Planning, with funding from National Oceanic and Atmospheric Administration Office for Coastal Management Award No. NA16NOS4730016.

- Courtney, C.A; Gelino, K; Romine, B.M.; Hintzen, K.D.; Addonizio-Bianco, C.; Owens, T.M.; Lander, M.; and Buika, J. 2019. *Guidance for Disaster Recovery Preparedness in Hawai'i*. Prepared by Tetra Tech, Inc. for the University of Hawai'i Sea Grant College Program and State of Hawai'i Department of Land and Natural Resources and Office of Planning, with funding from National Oceanic and Atmospheric Administration Office for Coastal Management award no. NA16NOS4730016.
- Hintzen, K. and Romine, B. (2019). *Sea Level Rise and Climate Change White Paper*. For the City and County of Honolulu Department of Planning and Permitting, Primary Urban Center Development Plan update. <https://www.pucdp.com/copy-of-background-documents>.
- Romine, B.M., Guannel, G., Eversole, D. (2015) *Beach Restoration in Hawaii: Challenges and Opportunities*. White paper for the Hawaii Shore and Beach Preservation Association 2014 Beach Restoration Workshop, November 24, 2014; Honolulu, Hawaii.
- Eversole, D.; Andrews, A.; et al. (2014) *Climate Change Impacts in Hawai'i - A summary of climate change and its impacts to Hawai'i's ecosystems and communities*. University of Hawaii Sea Grant College Program.
- Pap, R.; Owens, T.M.; Gonser, M; Romine, B.; Bohlander, A.; Eversole, D.; and Hwang, D., (2014). *Kaua'i Climate Change and Coastal Hazard Assessment*. University of Hawai'i Sea Grant College Program for the County of Kaua'i.
- Fletcher, C.H.; Romine, B.M.; Genz, A.S.; Barbee, M.M.; Dyer, M.; Anderson, T.R.; Lim, S.C.; Vitousek, S.; Bochicchio, C.; and Richmond, B.M., (2012). *National assessment of shoreline change: Historical shoreline changes in the Hawaiian Islands*. U.S. Geological Survey Open-File Report no. 2011-1051.
- Romine, B.M.; Fletcher, C.H.; Genz, A.S.; Barbee, M.M.; Dyer, M.; Anderson, T.R.; Lim, S.C.; Vitousek, S.; Bochicchio, C.; and Richmond, B.M. (2012). *National assessment of shoreline change: a GIS compilation of vector shorelines and associated shoreline change data for the sandy shorelines of Kaua'i, O'ahu, and Maui, Hawai'i*. U.S. Geological Survey Open-File Report no. 2011-1009.
- Fletcher, C.H.; Romine, B.M.; Barbee, M.M.; Lim, S.C., and Dyer, M. (2012). *O'ahu shoreline study erosion maps (1:3000) and GIS layers*.

PROFESSIONAL APPOINTMENTS

- | | |
|--------------|---|
| 2014-present | Hawai'i Shore and Beach Preservation Association Board of Directors |
| 2012-present | Member, Ocean Resources Management Plan coordinated working group, Hawai'i Office of Planning - Coastal Zone Management Program |
| 2018-2019 | Member, Community Response to Flooding Visioning Team, NOAA Sea Grant Program |
| 2017-2020 | Member, Hazard Mitigation Forum, Hawai'i Department of Emergency Management, State of Hawai'i Hazard Mitigation Plan update |

**SETTLEMENT AGREEMENT, RESTRICTIVE COVENANT, AND SEAWALL
REMOVAL PLAN**

This Settlement Agreement, Restrictive Covenant, and Seawall Removal Plan (“**Agreement and Covenant**”) is entered into by and between JAMES O’SHEA and DENISE O’SHEA, individually and as Trustees of the James C. and Denise O’Shea Living Trust, dated August 16, 2004 (“**O’Sheas**”), and the STATE OF HAWAII (“**State**”), and is hereby approved by the Board of Land and Natural Resources (“**Board**”), effective as of _____, 2022. The O’Sheas and the State are from time to time referred to jointly as the “**Parties**.”

RECITALS

WHEREAS, the O’Sheas are the fee simple owners of an oceanfront residential property located at 59-171 D Ke Nui Road, Hale‘iwa, O‘ahu, 96712, and identified as Tax Map Key No. (1) 5-9-002:025 (“**Property**”), having purchased the Property in 2001;

WHEREAS, the O’Sheas’ Property abuts submerged lands held in public trust by the State;

WHEREAS, a concrete seawall consisting of concrete pillars at the bottom and a concrete wall on top (“**Old Seawall**”) was formerly located seaward of the Property; and

WHEREAS, the O’Sheas contend that the Old Seawall was a nonconforming structure because it was constructed before statehood as evidenced, in part, by a date of 1957 subscribed into some of the concrete pillars, but the State does not agree or admit that the Old Seawall was legally nonconforming; and

WHEREAS, the Old Seawall collapsed on September 3, 2017; and

WHEREAS, the O’Sheas allege that the collapse was the result of actions taken by Rupert Oberlohr, who was, at the time, their adjoining neighbor directly to the west; and

WHEREAS, in November 2017, the O'Sheas finished constructing a new seawall ("**New Seawall**"), which is located approximately eleven feet landward or "*mauka*" of where the Old Seawall formerly stood; and

WHEREAS, the New Seawall fronting the Property is approximately fifteen feet tall, forty-six feet long, eight feet thick at the base, tapering to about two feet thick at the top, and is made of boulders grouted with concrete; and

WHEREAS, the O'Sheas contend that the New Seawall is merely a repair of the Old Seawall, but the State contends that it is a new structure; and

WHEREAS, the State contends that the New Seawall was built on State land located seaward or "*makai*" of the shoreline as defined in section 205A-1, Hawaii Revised Statutes ("**HRS**") which is the upper reaches of the wash of the waves, other than storm and seismic waves, at high tide during the season of the year in which the highest wash of the waves occurs, usually evidenced by the edge of vegetation growth, or the upper limit of debris left by the wash of the waves, but the O'Sheas contend that the New Seawall was built entirely on their Property; and

WHEREAS, the State filed an action in the Circuit Court of the First Circuit, State of Hawaii, captioned *State of Hawai'i v. James O'Shea and Denise O'Shea, as Trustees of the James and Denise O'Shea Trust, James O'Shea, individually, and Denise O'Shea, individually*, Civil No. 17-1-1543-09 (JPC) ("**Lawsuit**") on September 22, 2017; and

WHEREAS, the State's operative complaint in the Lawsuit is the Second Amended Complaint for Injunctive Relief filed therein on September 7, 2018 ("**SAC**"); and

WHEREAS, on September 17, 2018, the O'Sheas filed a Counterclaim against the State ("**Counterclaim**"); and

WHEREAS, on October 25, 2018, the O'Sheas also filed a Third-Party Complaint against Rupert T. Oberlohr, individually and as Trustee of the Rupert Oberlohr Trust, and on October 26, 2018, Mr. Oberlohr filed a Counterclaim against the O'Sheas, but there are no claims between the State and Mr. Oberlohr; and

WHEREAS, trial in this Lawsuit was scheduled to begin on August 22, 2022 before the Honorable Jeffrey P. Crabtree; and

WHEREAS, in addition to the Lawsuit, the Office of Conservation and Coastal Lands ("OCCL") of the Department of Land and Natural Resources ("DLNR") State of Hawai'i, also brought an administrative enforcement action against the O'Sheas before the Board of Land and Natural Resources ("**Board**") as Conservation District Enforcement File OA-18-06 ("**Enforcement Action**") on October 13, 2017; and

WHEREAS, the O'Sheas' petition for a contested case hearing on the Enforcement Action was granted, Contested Case OA-18-01 was opened regarding the Enforcement Action ("**Contested Case**"), but thus far, a hearing officer has not been appointed and the Contested Case has been stayed; and

WHEREAS, the Parties now desire to resolve the Lawsuit and the Contested Case by mutual agreement, pursuant to the terms and agreements set forth below;

WHEREAS, on _____ the Board delegated authority to its Chairperson to enter into this Agreement and Covenant;

WHEREAS, the Parties agree that the intent and purpose, *inter alia*, of this Agreement and Covenant are that the restrictions herein are encumbrances on the Property and shall run with the land for as long as this Agreement and Covenant is in effect.

AGREEMENT AND COVENANT

NOW THEREFORE, in consideration of the terms, provisions, covenants, restrictions, reservations, servitudes, conditions, understandings, and agreements set forth in this Agreement and Covenant, and for other good and valuable consideration, the receipt and sufficiency of which are acknowledged, the Parties hereby agree as follows:

A. INCORPORATION BY REFERENCE. All of the recitals, statements, declarations, and background information above are hereby specifically incorporated herein as declarations and material terms of this Agreement and Covenant.

B. CONSIDERATION. In consideration of the promises, conditions, and mutual releases described in this Agreement and Covenant, the Parties agree to the following terms:

C. COVENANTS, RESTRICTIONS, AND SETTLEMENT TERMS

(a) Servient land. This Agreement and Covenant concerns the New Seawall located at 59-171 D Ke Nui Road, Hale‘iwa, O‘ahu, 96712, and identified as Tax Map Key No. (1) 5-9-002:025 (“Servient land”).

(b) Dominant land. The Servient land fronts submerged lands held in public trust by the State of Hawai‘i (“Dominant land”).

(c) Covenantor. The Servient land is owned in fee simple title by James C. and Denise O’Shea Living Trust, dated August 16, 2004 (“Covenantor”).

(d) Covenantee. The Dominant land is held in fee simple title by the State of Hawaii (“Covenantee”).

(e) Use Restrictions. As a part of this Covenant and Agreement, the Covenantor hereby imposes and agrees to comply with the following activity and use limitations and burdens on the Servient land:

(f) Removal of the New seawall. The Covenantor shall remove the entirety of the New Seawall which sits immediately seaward of the Servient land by December 31, 2024. The Covenantor is not required to remove the debris from the Old Seawall located seaward of the Property on the Dominant land. However, if circumstances outside of the Covenantor's control make it impossible to remove the New Seawall by December 31, 2024 (including, but not limited to, logistical issues outside of the Covenantor's control, weather conditions, established inability to secure a contractor to perform the work notwithstanding documented efforts, etc.), then the Covenantor may petition the Board for additional time in which to remove the New Seawall. The mere fact that surf becomes higher in the winter months is not in itself a circumstance outside of the Covenantor's control; the Covenantor agrees to plan so that removal can take place when conditions allow. The Covenantor recognizes, acknowledges, and admits that any additional time to remove the New Seawall past December 31, 2024 will require Board approval. The Covenantor understands and agrees that absent Board approval, they will remove the New Seawall by December 31, 2024.

(g) Licensed Contractor. The Covenantor shall use the appropriately licensed contractor to perform the demolition, removal, and disposal of the New Seawall.

(h) Permitting. The Covenantor shall obtain all necessary state and/or City and County permits as required by law to perform the demolition, removal, and disposal of the New Seawall, including, but not limited to, obtaining a land disposition from the O'ahu District Land Division (i.e. a Right of Entry or a Revocable Permit), to the extent required by law for the removal project. The Covenantor may apply for any available, applicable, or required permit as allowed by law to effectuate this Agreement and Covenant.

(i) Indemnification by the Covenantor; Exceptions. The Covenantor shall indemnify and defend the Covenantee from any claims arising from the New Seawall or any work associated with removing the New Seawall. However, this obligation does not extend to any claims brought by adjacent homeowners alleging that the New Seawall should not be removed at all.

(j) Insurance. The Covenantor, or their independent construction contractor, shall obtain commercial general liability insurance with minimum coverage of ONE MILLION DOLLARS (\$1,000,000) for each occurrence and a general policy aggregate of not less than TWO MILLION DOLLARS (\$2,000,000) per policy year. The insurance will cover liability arising out of the removal of the New Seawall, as well as any liability which is incurred before removal takes place but while the New Seawall remains on the beach. If the work to remove the new seawall takes longer than six months, the Covenantor must increase the limit to TWO MILLION DOLLARS (\$2,000,000) for each occurrence and THREE MILLION DOLLARS (\$3,000,000) aggregate. Each such insurance policy shall name The State of Hawaii, Department of Land and Natural Resources, and the Office of Conservation and Coastal Lands as additional insureds. Copies of each insurance policy shall be produced to the State no later than ten (10) days prior to commencement of removal work. If liability insurance is required for any land disposition, the insurance policies required under this Agreement and Covenant shall satisfy both requirements.

(k) Cooperation. The Coventantee will cooperate with the Covenantor in obtaining any permits required for removal, as necessary, but the Covenantee is not expected to exert undue influence on any board, commission, or agency in obtaining any permits or

approvals. Approval of any required permits will not be unreasonably withheld nor unreasonably delayed. The State will work to expeditiously process all permit applications.

(l) HEPA Exemption. OCCL shall ask the Board to find the demolition of the New Seawall is exempt from HRS Chapter 343, pursuant to Hawaii Administrative Rules (“HAR”) § 11-200.1-15.

(m) The Covenantee May Remove the New Seawall if the Covenantor Does Not. If the Covenantor does not remove the New Seawall by December 31, 2024, or a further date allowed by the Board, the Covenantee may immediately and without further notice proceed to remove the wall or have the wall removed. The Covenantor agrees to reasonably cooperate with the State to accomplish removal and the Covenantor understands and agrees that this Agreement and Covenant shall constitute a right of entry for purposes of any such removal by the Covenantee. The Covenantor shall indemnify and defend the Covenantee from any claims arising from the work of removing the wall, but this obligation shall not extend to claims by adjacent homeowners alleging that the New Seawall should not be removed at all. The Covenantor will be jointly and severally liable for all costs incurred by the Covenantee to remove the New Seawall in the event the Covenantor fails to comply with the requirements of this Agreement and Covenant.

(n) Payment of Fines. The Covenantor shall be jointly and severally liable to OCCL for the payment of \$50,000.00 in fines and \$2,500.00 in administrative costs for the Enforcement Action and not as damages, which will become payable in full on the deadline for the removal of the New Seawall (i.e. on December 31, 2024, unless a further deadline is approved by the Board). However, if (1) the New Seawall and all other unpermitted shoreline protection devices are removed by December 31, 2024 or by a further deadline approved by the

Board, and (2) the Covenantor submits proof of payment for the costs of removal, then the costs of removal will be credited against the full amount of \$52,500.00 in fines and costs. In other words, the Covenantor may offset the entire \$52,500.00 with their removal costs if they provide proof that they have paid \$52,500.00 or more towards removal. The Covenantor shall receive no credit for their removal costs, and the entire \$52,500.00 in fines and costs will become immediately due and payable, if the New Seawall is not removed by December 31, 2024 or a further deadline approved by the Board. Failure to pay the entire \$52,500.00 when due, if not offset by the costs of removal, shall constitute a material breach of this Agreement and Covenant.

(o) Change in Law. In the event that there is a change to State law or policy that permits shoreline protection structures prior to removal of the New Seawall, the Covenantor may apply for such permits, which if granted would relieve the Covenantor of its removal obligations under this Agreement and Covenant.

D. DISPOSITION OF THE LAWSUIT. Within ten (10) days from the execution of this Agreement and Covenant, the Parties shall execute a Stipulated Judgment, the form and content of which is attached hereto as Exhibit “A” and incorporated herein by reference.

(a) The Stipulated Judgment will be recorded in the Bureau of Conveyances of the State of Hawai‘i and shall run with the land. The Covenantor shall not execute on the stipulated judgment until January 1, 2025 or such other extensions as may be granted by the Board, unless there is a material default of the Agreement and Covenant by the Covenantor.

(b) The Parties shall cooperate in obtaining any other Court order, including but not limited to HRS § 663-15.5 approval, if applicable, that the O’Sheas determine will limit their liability from claims by others.

E. CLOSING THE CONTESTED CASE. Within ten (10) days from the execution of this Agreement and Covenant, OCCL Contested Case OA-18-01 regarding OCCL Enforcement Action OA-18-06 will be dismissed by stipulation of the Parties, subject to final approval of the Board pursuant to HRS § 91-9(e).

F. RELEASES. The O'Sheas, for themselves, and their successors and assigns, hereby release and forever discharge the State from any and all claims, demands, causes of action, obligations, damages, and liabilities, known or unknown, which were or could have been raised in this Lawsuit, or which arise out of the removal of the New Seawall by the O'Sheas and the debris of the Old Seawall to the extent the State undertakes such removal.

The State will release and forever discharge the O'Sheas from any and all claims, demands, causes of action, obligations, damages, and liabilities which could have been raised in the Lawsuit or the Enforcement Action to the extent not already resolved by the stipulated judgment and the dismissal of the Contested Case. The State represents that the Enforcement Action is the only DLNR violation currently pending against the O'Sheas.

This release, however, shall not apply to any obligations arising under this Agreement and Covenant, any asserted breach of this Agreement and Covenant, or any future action to enforce this Agreement and Covenant by the Parties.

G. DECLARATION OF RESTRICTIVE COVENANT. This Agreement and Covenant and Stipulated Judgment shall serve as a restrictive covenant that shall run with the land and shall bind, inure to the benefit of, and constitute notice to the respective purchasers, successors, grantees, assignees, mortgagees, lienors, and any other person who claims an interest in the Property.

H. BINDING EFFECT. All of the covenants, restrictions, reservations, and servitudes set forth in this Agreement and Covenant shall run with the land and shall be binding upon the Property owner and all assigns and successors in interest, including any Transferee, subject to amendment or termination as set forth herein. The term “Transferee” as used in this Agreement and Covenant shall mean any future owner of any interest in the Property or any portion thereof, including, but not limited to, owners of an interest in fee simple, mortgagees, easement holders, and/or lessees.

I. SUCCESSORS AND ASSIGNS. This Agreement and Covenant shall be binding upon and shall inure to the benefit of each of the Parties hereto and their respective successors and assigns, including all subsequent owners of the Property. Parties shall mean and be deemed to include all of the following: the named parties; their respective heirs, executors, administrators, corporate representatives, divisions, successors, successors in trust, successors in interest, successor trustee, trustee, trustee in bankruptcy, receiver, guardians, legal representatives and assigns, and all persons, entities or parties claiming by, through or under the named parties, its general partners, parent companies, subsidiary companies, holding corporations and/or related companies, joint venturers, respective stockholders, officers, directors, agents, employees, vendors, attorneys, insurers, adjusters, and reinsurers.

J. NOTICE UPON CONVEYANCE. Each instrument hereafter conveying any interest in the Property or any portion of the Property shall contain a notice of activity and use limitations as set forth in this Agreement and Covenant, and provide the recorded location of this Agreement and Covenant. The notice shall be substantially in the following form:

THE INTEREST CONVEYED HEREBY IS SUBJECT TO A
RESTRICTIVE COVENANT, DATED _____, 2022,

RECORDED IN THE DEED OR OFFICIAL RECORDS OF THE
STATE OF HAWAII, BUREAU OF CONVEYANCES ON
_____, 2022, IN BOOK ___, PAGE _____. THE
COVENANT CONTAINS ACTIVITY AND USE LIMITATIONS.

K. STATE RECOMMENDATIONS. The O'Sheas acknowledge and understand the following recommendations from the State are to promote, but not guarantee, the timely removal of the New Seawall:

(a) The OCCL recommends the O'Sheas enter into a contract with the necessary licensed contractor(s) by May 31, 2023 and submit removal plans to the OCCL by July 31, 2023.

(b) The OCCL recommends the O'Sheas obtain a land disposition from the O'ahu District Land Division by August 31, 2023 to ensure the removal is timely.

L. REMEDIES FOR BREACH. The Covenantor's failure to remove the New Seawall on the terms above shall be a material default of this Agreement and Covenant. If there is a material default of the Agreement and Covenant, then: (i) the State may exercise any remedies provided in this Agreement and Covenant or Stipulated Judgment; (ii) any amounts owed under this Agreement and Covenant, shall become immediately due, owing, and payable at the option of the State; and (iii) the State may pursue all legal post-judgment remedies it may have against the O'Sheas including the recovery of fees, costs, and expenses, including reasonable attorneys' fees, as provided by law. If the State fails to exercise this, or any other, option, said failure to exercise an option shall not constitute a waiver of its right to exercise this,

or any other, option in the event of any subsequent default. However, enforcement for a breach of this Agreement and Covenant is subject to any applicable statute of limitations.

M. LEGAL FEES AND COSTS. The Parties shall bear their own attorneys' fees, costs, and expenses incurred in connection with this Agreement and Covenant and the Lawsuit, except that the O'Sheas have agreed to pay \$577.50 to the State for deposition costs. However, in the event there is an action, suit, or proceeding to enforce this Agreement and Covenant or any of its terms, or otherwise relating to this Agreement and Covenant, the prevailing Party shall be entitled to recover its reasonable attorneys' fees and costs as determined by a court of competent jurisdiction.

N. GOVERNING LAW. This Agreement and Covenant shall be governed by and construed in accordance with the laws of the State of Hawai'i. The Parties hereby agree that all actions or proceedings in any way, manner, or respect, arising out of or from or related to this Agreement and Covenant may be litigated in state courts, as allowed by law. Should any provision of this Agreement and Covenant require interpretation, it is agreed that the party interpreting or considering same shall not apply the presumption that the term hereof shall be more strictly construed against a party by reason of the rule or conclusion that a document should be construed more strictly against the party who itself or through its agent prepared the same. It is agreed and stipulated that all parties hereto have participated equally in the preparation of this Agreement and Covenant and that legal counsel was consulted by each party before the execution of this Agreement and Covenant.

O. SEVERABILITY OF PROVISIONS. If any provision of this Agreement and Covenant is declared or determined by any court to be invalid, void, illegal, or unenforceable,

such provision shall be considered severed, and the validity of the remaining portions of the Agreement and Covenant shall not be affected thereby and shall be fully enforced.

P. COMPROMISE; NO ADMISSION. The Parties agree that nothing in this Agreement and Covenant, nor the covenants and releases in this Agreement and Covenant, nor the consideration to be made pursuant to this Agreement and Covenant, is to be construed as an admission of any liability whatsoever, by any of the Parties, but is to be construed strictly as a compromise and settlement of the Parties respective claims and for the purpose of avoiding further controversies, litigation, and expense for the matters set forth in this Agreement and Covenant.

Q. NO PARTY DEEMED DRAFTER. The Parties agree that no Party to this Agreement and Covenant shall be claimed or deemed to be the drafter of this Agreement and Covenant if any dispute arises over its interpretation.

R. SECTION HEADINGS. The section headings in this Agreement and Covenant are inserted only as a matter of convenience and for reference, and in no way limits, alters, or affects the scope or intent of any provision of the Agreement and Covenant.

S. COUNTERPARTS. The Parties agree that this Agreement and Covenant may be executed in counterparts and by facsimile, each of which shall be deemed an original, and said counterparts shall together constitute one and the same instrument, binding all the Parties thereto, notwithstanding that all the Parties are not signatories to the original or the same counterpart.

T. NO REPRESENTATIONS. The Parties nor anyone on their behalf has made a representation of fact, opinion or promise to induce this compromise, and the Parties are not relying upon any statements, representations, opinions or promises made by any person or party released or their agents, employees, insurers, representatives, attorneys, concerning the nature,

extent or duration of the injuries, losses, loss of profits, damages, exemplary damages, punitive damages, if any, or the legal liability therefore, or concerning any other thing or matter; that the above-mentioned consideration is received as a compromise settlement, and that this Agreement and Covenant is executed freely and upon the advice of counsel.

U. ENTIRE AGREEMENT. This Agreement and Covenant together with the Stipulated Judgment contains the entire Agreement and Covenant between the Parties with respect to the settlement of the Lawsuit and Contested Case. This Agreement and Covenant supersedes and replaces any and all prior or contemporaneous agreements or understandings, written or oral, with regard to the disposition of the Lawsuit and Contested Case. Prior negotiations related to this Agreement and Covenant and drafts of this Agreement and Covenant shall not be considered in interpreting this Agreement and Covenant, and are merged in this Agreement and Covenant. The terms of this Agreement and Covenant are contractual and not a mere recital.

V. MODIFICATION PROVISION. This Agreement and Covenant shall not be altered, amended, modified, or otherwise changed, in any respect whatsoever, except by a writing duly executed by all of the Parties to this Agreement and Covenant. Each Party hereby acknowledges and agrees that it will make no claim at any time that this Agreement and Covenant has been orally altered or modified in any respect whatsoever.

W. DUE AUTHORITY. The Parties warrant and represent that they have read this Agreement and Covenant, understand it, have consulted with their respective counsel regarding its legal effect, and have all necessary authority to execute and deliver this Agreement and Covenant. By signing this Agreement and Covenant, the Parties warrant and represent that this

Agreement and Covenant has been validly authorized and constitutes a legally binding and enforceable obligation for them.

X. GOOD FAITH SETTLEMENT. The Parties agree that the settlement, mutual releases, payments, and other terms of this Agreement and Covenant are reasonable and given in good faith, and that this Agreement and Covenant and all of its covenants and provisions are, and shall be, deemed a good faith settlement under HRS § 663-15.5. Nothing in this Agreement and Covenant requires any Party to seek a good faith determination from a court. However, if for any reason, such a determination becomes necessary, the Parties shall cooperate with each other and support a determination of good faith settlement by a court of competent jurisdiction.

AGREED AND ACCEPTED:

JAMES O'SHEA Date _____
Individually and as Trustee of the James and
Denise O'Shea Trust

DENISE O'SHEA Date
Individually and as Trustee of the James and
Denise O'Shea Trust

APPROVED AS TO FORM:

GREGORY W. KUGLE, ESQ.

LOREN A. SEEHASE, ESQ.

Attorneys for James O'Shea and Denise O'Shea, Individually and as Trustees of the James and Denise O'Shea Trust

AGREED AND ACCEPTED:

THE STATE OF HAWAI'I _____ Date _____
By: Suzanne D. Case

Title: Chairperson, Board of Land and Natural Resources, Department of Land and Natural Resources, State of Hawai‘i

APPROVED AS TO FORM:

LINDA L.W. CHOW, ESQ.

LAUREN K. CHUN, ESQ.

Deputy Attorneys General, Attorneys for the State of Hawai‘i

State of Hawai‘i v. James O’Shea and Denise O’Shea, as Trustees of the James and Denise O’Shea Trust, James O’Shea individually and Denise O’Shea, individually, Civil No. 17-1-1543-09 (JPC);
SETTLEMENT AGREEMENT AND COVENANT

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU) SS:
FIRST JUDICIAL CIRCUIT)

On _____, before me personally appeared JAMES O'SHEA, to me personally known, who, being by me duly sworn (or affirmed), did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Document Description: SETTLEMENT AGREEMENT AND COVENANT

Doc. Date: _____ No. pages: _____

Notary Signature Date

Name (printed): _____

My Commission expires: _____

STATE OF HAWAII)
CITY AND COUNTY OF HONOLULU) SS:
FIRST JUDICIAL CIRCUIT)

On _____, before me personally appeared DENISE O'SHEA, to me personally known, who, being by me duly sworn (or affirmed), did say that such person executed the foregoing instrument as the free act and deed of such person, and if applicable in the capacity shown, having been duly authorized to execute such instrument in such capacity.

Document Description: SETTLEMENT AGREEMENT AND COVENANT

Doc. Date: _____ No. pages: _____

Notary Signature Date

Name (printed): _____

My Commission expires: _____

IN THE CIRCUIT COURT OF THE FIRST CIRCUIT

STATE OF HAWAI'I

STATE OF HAWAI'I,

Plaintiff/Counterclaim
Defendant,

vs.

JAMES O'SHEA AND DENISE O'SHEA
as Trustees of the James and Denise O'Shea
Trust, JAMES O'SHEA, individually and
DENISE O'SHEA, individually, JOHN
AND JANE DOES 1-10,

Defendants/Counterclaimants.

JAMES O'SHEA and DENISE O'SHEA as
Trustees of the James and Denise
O'Shea Trust, JAMES O'SHEA,
individually and DENISE O'SHEA,
individually,

Third-Party Plaintiffs/
Counterclaim Defendants,

vs.

RUPERT T. OBERLOHR, individually;
RUPERT T. OBERLOHR, as Trustee of the
Rupert Oberlohr Trust; DOE
DEFENDANTS 1-100,

Third-Party Defendants/
Counterclaimants.

Civil No. 17-1-1543-09 JPC
(Other Civil Action, Injunctive Relief)
(Environmental Court)

STIPULATED JUDGMENT AND
ORDER

STIPULATED JUDGMENT AND ORDER

Plaintiff STATE OF HAWAII ("Plaintiff"), by and through its attorneys, Holly T. Shikada, Attorney General, and Linda L.W. Chow and Lauren K. Chun, Deputy Attorneys General and Defendants, James O'Shea and Denise O'Shea as Trustees of the James C. and Denise O'Shea Living Trust, dated August 16, 2004, James O'Shea, individually and Denise

Exhibit G

O'Shea, individually, (collectively "Defendants"), by and through their attorneys Greg W. Kugle and Loren A. Seehase, and, pursuant to the terms of the Settlement Agreement, Restrictive Covenant, and Seawall Removal Plan entered between them ("Agreement and Covenant"), attached as Exhibit "A", hereby stipulate to a judgment in favor of Plaintiff and against Defendant.

NOW, THEREFORE, JUDGEMENT IS HEREBY ENTERED in favor of Plaintiff and against Defendants, as follows:

1. Judgment be and hereby is entered in favor of the State, and against Defendants James O'Shea and Denise O'Shea as Trustees of the James and Denise O'Shea Trust, James O'Shea, individually and Denise O'Shea, individually ("Defendants") on all claims raised in the State's Second Amended Complaint for Injunctive Relief filed September 7, 2018 and all claims raised in the Defendants' Counterclaim filed September 17, 2018;

2. Defendants are hereby ordered to remove the New Seawall and all related construction debris in accordance with the Agreement and Covenant and all State and county permitting requirements.

3. The State is entitled to administrative fines and costs in the total amount of FIFTY TWO THOUSAND, FIVE HUNDRED DOLLARS (\$52,500.00) from Defendants in accordance with the terms and conditions set forth in the Agreement and Covenant.

4. This Judgment will be recorded in the Bureau of Conveyances of the State of Hawai'i and shall run with the land with the intent of the parties to give notice of the obligations under the Agreement and Covenant to any subsequent landowners of this matter.

5. The State shall not execute on this Judgment until January 1, 2025 or a further date approved by the Board of Land and Natural Resources in accordance with the Agreement

APPROVED AS TO FORM:

APPROVED AS TO FORM:

GREGORY W. KUGLE, ESQ.
LOREN A. SEEHASE, ESQ.
Attorneys for James O'Shea and Denise
O'Shea, Individually and as Trustees of the
James and Denise O'Shea Trust

LINDA L.W. CHOW, ESQ.
LAUREN K. CHUN, ESQ.
Deputy Attorneys General, Attorneys for the
State of Hawai'i

APPROVED AND SO ORDERED

JUDGE OF THE ABOVE-ENTITLED COURT

*State of Hawai'i v. James O'Shea and Denise O'Shea, as Trustees of the James and Denise O'Shea Trust,
James O'Shea individually and Denise O'Shea, individually, Civil No. 17-1-1543-09 (JPC);*
STIPULATED JUDGMENT AND ORDER.